Ján Klučka, Lucia Bakošová (eds.)

Green Ambitions for Sustainable Development

Past, Present and Future

Leges

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GREEN AMBITIONS FOR SUSTAINABLE DEVELOPMENT: PAST, PRESENT AND FUTURE

Pavol Jozef Šafárik University in Košice
Faculty of Law
Institute of International Law and European Law

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INTRODUCTION

The presented publication consists of proceedings of the international scientific conference "Green Ambitions for Sustainable Development: Past, Present and Future". The conference took place on 8–9 September 2022 at the Faculty of Law, Pavol Jozef Šafárik University in Košice, as well as through MS Teams.

The conference proceedings represent a partial output within the research project APVV-20-0576 under the title "Green challenges for sustainable development (European Green Deal in the context of international and domestic law)". The conference topics came up from the main objective of the mentioned project focused on the coherence of the objectives of the European Green Deal with existing legal instruments of public international law aimed at environmental protection, climate neutrality and biodiversity conservation.

The European Green Deal is a non-binding document presented by the European Commission on 11th of December 2019 to meet the *United Nations* (hereinafter "UN") *Sustainable Development Goals*, known as the *2030 Agenda for Sustainable Development* (hereinafter "2030 Agenda"), which was adopted unanimously in 2015 by UN Member States in the form of the UN General Assembly resolution – entitled *"Transforming Our World: Agenda 2030 for Sustainable Development"*. Agenda 2030 is a collection of 17 interlinked goals that call for the international community to eradicate poverty, protect the planet and ensure peace and prosperity by 2030. These goals need to be met through sustainable development, which can be defined as development that meets today's needs without compromising the ability of future generations to meet their own needs. To achieve this, it is necessary to reconcile three basic elements: economic growth, social inclusion (especially through gender equality) and environmental protection.

The aim of the European Green Deal is to transform all sectors of the economy towards sustainable development with the lowest possible impact on the environment and the climate. The plan of measures to ensure the transformation includes, in addition to allocating the necessary funding, specific measures to ensure clean and circular economy, and in particular measures to halt climate change, maintain biodiversity and reduce pollution.

The participants of the conference made contributions on various topics falling within the scope of the conference theme including historical deve-

lopment and current form of legal arrangement of the principle of sustainable development in public international law, contributions of UN human rights treaty-bodies to realization of green ambitions and sustainable development, ecocide as a potential new crime under international law, impact of climate change reaching the stage of emergency for international human rights litigation, applicable law in case of crossborder environmental damage, European legal perspective on artificial intelligence in the context of the European Green Deal, and other current relevant international legislation, green policy coordination competition, policy's potential for supporting sustainable development and legal aspects of a sustainable product policy in European law.

The entire team of the project researchers believes that these conference proceedings represent enrichment of scientific and professional literature in the field of international environmental law and environmental law of the European Union.

July 12, 2022

prof. JUDr. Juraj Jankuv, PhD.

1 HISTORICAL DEVELOPMENT AND CURRENT FORM OF LEGAL ARRANGEMENT OF THE PRINCIPLE OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW

Juraj Jankuv

Abstract

The paper is focused on the issue of historical development and the current form of legal arrangement of the principle of sustainable development in the international public law. The principle of sustainable development began to evolve mainly following a report entitled "Our Common Future" presented by the World Commission on Environment and Development in 1987. This report is considered a part of a separate branch of international public law – international environmental law but is concerned as a part of the other emerging branch of international public law – international development law. This principle was later enshrined in Principles 3 and 4 of the UN Declaration on Environment and Development (1992), in the great number of other documents of non-binding character but also in the most recent binding international treaties in the field of environmental protection, such as Convention on Biological Diversity (1992) or Framework Convention on Climate Change (1992). The paper is dedicated to the identification of the most important levels of international law arrangements of the principle of sustainable development in terms of its historical development and its current form, by analysing the most important relevant international regulations in this area and to the identification of the conceptual concept of the principle of sustainable development coming up from existing views of the international law science.[1]

Introduction

The concept of sustainable development has been conceptualized originally within the structure of international environmental law as a special branch of international public law (later shortened to international law). This concept was first indirectly outlined in many soft law documents among which

[1] The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)".

the most important is the Declaration of The United Nations Conference on the Human Environment (1972), called also shortly the Stockholm Declaration. The principle of sustainable development as such began to evolve in international environmental law mainly following a report entitled *"Our Common Future"* presented by the World Commission on Environment and Development in 1987, named after the leading person of this commission as the Brundtland Report. In that report, this commission proposed that global environmental problems would be addressed by a new type of economic development, which has been called sustainable development. According to the report, it is about the development of human society that can meet the needs of the current generation without jeopardizing the needs of future generations or at the expense of other countries. It therefore includes aspects of intragenerational solidarity within one current generation of mankind, both nationally and internationally, and intergenerational solidarity in relation to the interests of future generations of mankind.[2] This principle was later enshrined in Principles 3 and 4 of the *Rio Declaration on Environment and Development* (1992), but also in numerous most recent international treaties in the field of environmental protection, such as v *Convention on Biological Diversity* (1992) or *Framework Convention on Climate Change* (1992). An important new impetus for the development of this principle was provided mainly by non-binding documents such as the UN General Assembly resolution – entitled *"Programme for the Further Implementation of Agenda 21"* (1997), the *United Nations Millennium Declaration* (2000) or the UN General Assembly resolution – entitled *"Transforming Our World: Agenda 2030 for Sustainable Development"* (2015).

In the light of the texts of above-mentioned documents and treaties this principle is becoming even a part of international development law as a new emerging branch of international law. Sustainable development has acquired the status of the most significant and influential legal and policy-making principle in all areas of activities as an indispensable tool in managing development law.[3]

The first goal of this paper is to identify the most important levels of international law arrangement of the principle of sustainable development in

[2] ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo veřejné. 2. vydání.* Praha: C. H. Beck, 2018, p. 207, ISBN 978-80-7400-721-7.

[3] FITZMAURICE, M.: *The Principle of Sustainable Development in International Development Law*. In: MANIRUZZAMAN, A. F. M. et al. *International Sustainable Development Law,* Vol. I. EOLSS Publishers/UNESCO, 2010, p. 112, ISBN 978-1-84826-314-7.

terms of its historical development and its current form, in the context of international environmental law and international development law. This goal is to be reached by analysing the most important relevant international arrangement and case law of international judiciary bodies in this area. The second goal of this paper is to outline the conceptual content of the principle of sustainable development. This goal is to be reached by analysing existing views of the international law science in this respect.

1.1 Principle of Sustainable Development in International Environmental Law

As it was mentioned already, the principle of sustainable development has been conceptualized originally within the structure of international environmental law and is contained in various non-binding *soft law* documents and binding international treaties. International judiciary bodies developed also the case law explaining the way of application of this principle. Considerations are existing as for the customary character of the mentioned principle. International law theory fixes some customary rules contributing to the effective application of this principle, as well.

1.1.1 The Non-Binding International Environmental Law Documents Establishing a Basis for Development of the Concept of the Sustainable Development

The concept of the sustainable development evolved itself in connection with several non-binding international environmental law documents establishing a basis for development of this principle addressing this question indirectly.

The relationship between economic development and the need to preserve natural resources was firstly mentioned at the *United Nations Conference on the Conservation and Utilization of Resources* (*UNCCUR) in 1949. This conference was organized* to promote awareness and need for international action to ensure a balanced management and conservation of natural resources. However, the success of the UNCCUR was limited due to a lack of international political will to meet this ambitious objective.

More profound ideas as for the concept of sustainable development provides for *Declaration of The United Nations Conference on the Human Environ-*

ment (1972)[4] adopted at *The United Nations Conference on Human Environment* (1972) in Stockholm. Although the Stockholm Declaration is not a binding document on States, it establishes the basic rules of international environmental law. In general, the Stockholm Declaration has the following structure. It starts with a general invocation which links the environment with fundamental human rights. Further, it deals with the management of natural resources and the threat of pollution. Next, it considers the relationship between the environment and development which since 1972 was the main area of confrontation between the industrialized and developing countries.[5]

Questions of mutual relationship of environment and development are contained in Principles 8 to 14, mainly. Principle 8 sets the general background for development and states that *"economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life."*

Of great importance for the future were Principles 9 and 11. Principle 9 expressly stipulated that the environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can be best remedied by accelerated development through financial and technological assistance as a supplement to the domestic effort of the developing countries.

Principle 11 stresses a very important aspect of the link between the environment and development, namely it postulates that the environmental policies of states should enhance and not adversely affect the present and future development potential of developing countries, and that they should not hamper the attainment of better living conditions for all. This principle further states that steps should be taken by states and international organizations with a view to reaching an agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

Principle 13 contains important undertake of States to adopt an integrated and co-ordinated approach to their development planning to ensure that de-

[4] *Declaration of The United Nations Conference on the Human Environment* (1972). UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972).

[5] FITZMAURICE, M.: *The Principle of Sustainable Development in International Development Law*. In: MANIRUZZAMAN, A. F. M. et al.: *International Sustainable Development Law,* Vol. I. EOLSS Publishers/UNESCO, 2010, pp. 112–118, ISBN: 978-1-84826-314-7.

velopment is compatible with the need to protect and improve environment for the benefit of their population, to achieve a more rational management of resources and thus to improve the environment. Principle 14 in this continuity further stresses that rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.

The Stockholm Declaration in these provisions refers to the balance between the environmental protection and the economic development and says that to provide the maximum benefit to the people, the States should integrate economic development with protection of the environment.[6] While the States have a sovereign right to use their own natural resources, they must ensure that such use does not adversely affect the environment of neighbour States.

Another important relevant non-binding document as for the development of the concept of sustainable development is the *World Charter for Nature* (1982).[7] This document mentions the importance of environmental protection in the economic development. It however emphasises the specific principles of environmental protection, which are designed to guide the economic development.

The most important non-binding document conceptualizing the principle of sustainable development was the *Report "Our Common Future"* presented by the World Commission on Environment and Development (WCED) in 1987, called in shortened form as the Brundtland report (1987).[8] The Brundtland Report (1987) is commonly viewed as the point at which sustainable development became a broad global policy objective and set the international community on the path that led to the establishment of international law in the field of sustainable development or international development law.[9] The Brundtland Report defined sustainable development as "development that

[6] VIRIYO, A.: *Principle of Sustainable Development in International Environmental Law*, 22 August 2012, p. 3. Online: https://ssrn.com/abstract=2133771 or http://dx.doi.org/10.2139/ssrn.2133771 (quoted 1 July 2022).

[7] *World Charter for Nature* (1982), UN Doc. A/RES/37/7 (1982).

[8] BRUNDTLAND, G. H.: *Report of the World Commission on Environment and Development: Our Common Future*, UN GA Doc. A/42/427 (1987), 300 p.

[9] SANDS, P., PEEL, J., FABRA, A., MACKENZIE, R.: *Principles of International Environmental Law. Third Edition*. Cambridge: Cambridge University Press, 2012, p. 9, ISBN 978-0-521-14093-5.

meets the needs of the present generations without compromising the ability of future generations to meet their own needs".[10]

The Brundtland Report identified critical objectives for environment and development policies reflected in the concept of sustainable development. These objectives include reviving growth and changing its quality, meeting essential needs for jobs, food, energy, water and sanitation, ensuring a sustainable level of population, conserving and enhancing the resource base, reorienting technology and managing risk, and merging environment and economics in decision-making.[11]

Coming up from the Brundtland report the international law of sustainable development encompasses but is not limited to international environmental law. It also includes the social and economic dimension of development, the participatory role of major groups, and financial and other means of implementation. The integration of environmental considerations with other social objectives has led to the development of an environmentally oriented human rights jurisprudence, and the integration of environment into matters such as international trade and investment law, international law of armed conflict and international criminal law.[12] The Brundtland report formed the principle of sustainable development as such and promoted to place its concept as a common principle to two separate branches of international law – international environmental law and international development law.

However, the Brundland report was only a special document of scientific character and did not bring sustainable development within the legal sphere.

1.1.2 The Non-Binding International Environmental Law Documents Implementing the Principle of Sustainable Development within the Legal Sphere

The first important non-binding international law document bringing the principle of sustainable development within the legal sphere was the *Rio De-*

[10] BRUNDTLAND, G. H.: *Report of the World Commission on Environment and Development: Our Common Future.* UN GA Doc. A/42/427 (1987), p. 43.

[11] *Ibid.*, p. 49–65.

[12] Compare with SANDS, P., PEEL, J., FABRA, A., MACKENZIE, R.: *Principles of International Environmental Law. Third Edition.* Cambridge: Cambridge University Press, 2012, p. 9, ISBN 978-0-521-14093-5.

claration on Environment and Development (1992)[13] better known as the Rio Declaration. This document was the final product of the *United Nations Conference on Environment and Development* (1992). This document is predominantly a document forming and enhancing international environmental law, including the principle of sustainable development. It was a watershed event in the evolution of the conceptual basis for the further development of the principle of sustainable development but also international development law.[14] It was also the most fundamental landmark in sustainable development's history since brings sustainable development within the legal sphere.[15]

Malgosia Fitzmaurice states that the twenty-seven principles of the Rio Declaration represent something of a "package deal", which was achieved through consensus. The compromise reached reflects in principles of the Rio Declaration, the input of the developing and developed states. The interests of developed states are expressed by the inclusion of such principles as Principle 4 (the integration of environmental protection and development); Principle 10 (public participation); Principle 15 (precautionary principle); and Principle 17 (environment impact assessment). Other principles reflect the policies of developing states, such as Principle 3 (right to development); Principles 6 and 7 (poverty alleviation and capacity building). Principles 3 and 4 together form core of the principle of sustainable development. Throughout, the principal concern of the Declaration, and those who negotiated it, was to integrate the needs of economic development and environmental protection in a single, if not wholly coherent ensemble.[16]

In the spirit of the conclusions of the Rio Conference a major UN body to support sustainable development activities was created – *the UN Commission on Sustainable Development*, established in 1992 as a subsidiary of the UN Economic and Social Council, to monitor the implementation of documents

[13] *Statement of Principles for the Sustainable Management of Forests*, UN Doc. A/CONF.151/26, Vol. I (1992).

[14] FITZMAURICE, M.: *The Principle of Sustainable Development in International Development Law*. In: MANIRUZZAMAN, A. F. M. et al.: *International Sustainable Development Law*, Vol. I. EOLSS Publishers/UNESCO, 2010, p. 119, ISBN 978-1-84826-314-7.

[15] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 379, ISSN 0938-5428.

[16] FITZMAURICE, M.: *The Principle of Sustainable Development in International Development Law*. In: MANIRUZZAMAN, A. F. M. et al.: *International Sustainable Development Law,* Vol. I. EOLSS Publishers/UNESCO, 2010, p. 119–120, ISBN 978-1-84826-314-7.

adopted in Rio. The UN Commission on Sustainable Development was abolished in 2013, but not without compensation. It has been replaced by a new body called the *High-level Political Forum on Sustainable Development.*

The other product of the 1992 United Nations Conference on Environment and Development was a document called *Agenda 21* (1992).[17] This document has 40 chapters which is in theory divided to four sections. Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment. As for the principle of sustainable development is important even the third document adopted at the 1992 United Nations Conference on Environment and Development called *Statement of Principles for the Sustainable Management of Forests.*[18]

These documents were supplemented in 1997 by the *UN General Assembly resolution* S-*19/2 "Programme for the Further Implementation of Agenda 21"*[19] as an outcome of Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21 New York, 23–27 June 1997 called also *Earth Summit Rio+5* (1997). To revitalize and energize commitments to sustainable development the objectives of this summit include frankly recognize failures and identify reasons why, recognize achievements and identify actions that will boost them, define priorities for the post-97 period and raise the profile of issues addressed insufficiently by Rio. The UN General Assembly affirmed in this document that environmental protection, economic development, and social development were three interdependent dimensions of sustainable development. In fact, it added the *third social pillar* to the concept of sustainable development.

The UN Millennium Summit in September 2000 at UN Headquarters in New York of the UN member States unanimously adopted the *United Nations Millennium Declaration*[20] with significant environmental and sustainable development dimension. This declaration contains eight Millennium Development Goals (MDGs) to reduce extreme poverty by 2015. All 191 United Nations member states, and at least 22 international organizations, committed to help achieve the following Millennium Development Goals

[17] *Statement of Principles for the Sustainable Management of Forests*, UN Doc. A/CONF.151/26, Vol. II, (1992).

[18] *Ibid.*

[19] UN General Assembly resolution S-19/2 "Programme for the Further Implementation of Agenda 21", UN GA Res S-19/2, 28 June 1997.

[20] *United Nations Millennium Declaration*, UN Doc. A/RES/55/2, 2000.

by 2015: Eradicate extreme poverty and hunger (MDG01), achieve universal primary education (MDG02), promote gender equality and empower women (MDG03), reduce child mortality (MDFG04), improve maternal health (MDG05), combat HIV/AIDS, malaria, and other diseases (MDG06), ensure environmental sustainability (MDG08) and develop a global partnership for development (MDG08).

The 2002 World Summit on Sustainable Development in Johannesburg (called also Rio +10 Earth Summit) adopted a Political Declaration called *Johannesburg Declaration on Sustainable Development*[21] and Implementation Plan named *Plan of Implementation of the World Summit on Sustainable Development*.[22] These documents included provisions covering a set of activities and measures to be taken in order to achieve development that takes into account respect for the environment. In doing so, this Summit, resulted, after several days of deliberations, decisions that related to water, energy, health, agriculture, biological diversity and other areas of concern.[23]

At the *United Nations Conference on Sustainable Development* (Rio+20) in Rio de Janeiro, Brazil, in June 2012, Member States adopted the outcome document *"The Future We Want"*[24] in which they decided, inter alia, to launch a process to develop a set of Sustainable Development Goals (SDGs) to build upon the MDGs and to establish the *UN High-level Political Forum on Sustainable Development*.[25] The Rio +20 outcome also contained other measures for implementing sustainable development, including mandates for future programmes of work in development financing, small island developing states and more.[26] However, negotiators were unable to agree on a set of Sustainable Development Goals.[27]

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[21] *Johannesburg Declaration on Sustainable Development*, UN Doc. A/CONF.199/20, Chapter 1, Resolution 1 (2002).

[22] *Johannesburg Declaration on Sustainable Development*, UN Doc. A/CONF.199/20, Chapter 1, Resolution 2 (2002).

[23] United Nations: *World Summit on Sustainable Development, 26 August-4 September 2002, Johannesburg*. Online: https://www.un.org/en/conferences/environment/johannesburg2002 (quoted 1 July 2022).

[24] UN General Assembly resolution 66/288 "The Future We Want" (2012), UN Doc. A/RES/66/288 (2012).

[25] 17 Sustainable Development Goals. Online: https://sbbridge.eu/17-sustainable-development-goals/ (quoted 1 July 2022).

[26] *Ibid.*

[27] NATZGAAM, G., VAN HOOK, E., GUILFOYLE, D.: *International Environmental law. A Case Study Analysis*. London and New York: Routledge, 2020, p. 22, ISBN 978-1-138-55676-8.

In 2015, UN General Assembly adopted resolution *"Transforming Our World: Agenda 2030 for Sustainable Development"*[28] which is in fact a plan of sustainable development with a set of guidelines, working toward making our planet more sustainable for future generations, allowing for economic growth and economic development while at the same time prioritizing environmental protection. The key provisions of this resolution are so called *"Sustainable Development Goals"* placed to its text after section 59 of the resolution. The Sustainable Development Goals (SDGs) succeeded the MDGs from 2000. This set of goals include 17 goals as it follows: End poverty in all its forms everywhere (SDG01), end hunger, achieve food security and improved nutrition and promote sustainable agriculture (SDG02), ensure healthy lives and promote well-being for all at all ages (SDG03), ensure inclusive and equitable quality education and promote lifelong learning opportunities for all (SDG04), achieve gender equality and empower all women and girls (SDG05), ensure availability and sustainable management of water and sanitation for all (SDG06), ensure access to affordable, reliable, sustainable and modern energy for all (SDG07), promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all (SDG08), build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation (SDG09), reduce inequality within and among countries (SDG10), make cities and human settlements inclusive, safe, resilient and sustainable (SDG11), ensure sustainable consumption and production patterns (SDG12), take urgent action to combat climate change and its impacts (SDG13), conserve and sustainably use the oceans, seas and marine resources for sustainable development (SDG14), protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss (SDG15), promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels (SDG16) and strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development (SDG17). *"Sustainable Development Goals"* should be fulfilled by international community up to 2030. The resolution provides a detailed survey of the contains of these goals and creates, identifies means of their implementation. The 17 Goals include 169 targets.

[28] UN General Assembly resolution "Transforming Our World: Agenda 2030 for Sustainable Development", UN Doc. A/RES/70/1 (2015).

The SDGs include goals of environmental, economic and social character. This fact underlines the three basic pillars of the sustainable development. The 17 Goals and 169 targets identified by the Agenda directly emphasize the above-mentioned interconnectedness and attempt to trace a practical framework for action (i.e. many environmental targets are envisioned as simultaneously relating to both environmental and socio-economic Goals) that dodges the rigid compartmentalization ingrained in the structure of the MDGs. Despite its weaknesses, this approach holds great significance for the future of international environmental law. Indeed, on the one hand, the approach shows the potential to innovate and concretize the statements of principles contained in the Rio Declaration and other related "soft-law" instruments, thereby playing an important role in the advancement and further specification of the concept of sustainable development as a (legal) principle of integration.[29]

The latest event as for the developing the principle of sustainable development was the *United Nations Stockholm+50 Conference* (2022). The two-day international meeting concluded with a statement from co-hosts Sweden and Kenya, drawn from Member States and stakeholders through the meeting's plenaries and leadership dialogues. The statement contains several recommendations for an actionable agenda, including, among others, placing human well-being at the centre of a healthy planet and prosperity for all; recognizing and implementing the right to a clean, healthy and sustainable environment; adopting systemwide changes in the way our current economic system works, and accelerate transformations of high impact sectors. Stockholm+50 featured four plenary sessions in which leaders made calls for bold environmental action to accelerate the implementation of the 2030 Agenda and the Sustainable Development Goals.[30]

The system of all the previous non-binding documents created also the institutional structure endorsing the fulfilment of SDG goals. The annual *High-level Political Forum on Sustainable Development* serves as the central UN platform for the follow-up and review of the SDGs. As it was mentioned already, the establishment of the United Nations High-level Political Forum on Sustainable Development (HLPF) was mandated in 2012 by the outcome

[29] PAVONI, R., PISSELI, D.: *The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation*. In: Veredas Do Direito, Vol. 13 (26), 2016, p. 17. Online: https://ssrn.com/abstract=2919246 (quoted 1 July 2022).

[30] Stockholm+50. Online: https://www.stockholm50.global/news-and-stories/press-releases/stockholm50-closes-call-urgent-environmental-economic (quoted 1 July 2022).

document of the United Nations Conference on Sustainable Development (Rio+20), *"The Future We Want"*. The format and organizational aspects of the Forum are outlined in *UN General Assembly resolution 67/290 "Format and organizational aspects of the high-level political forum on sustainable development"* (2013).[31] The Forum meets annually under the auspices of the Economic and Social Council for eight days, including a three-day ministerial segment and every four years at the level of Heads of State and Government under the auspices of the General Assembly for two days.[32]

Other important body is *the Division for Sustainable Development Goals* (DSDG) in the *United Nations Department of Economic and Social Affairs* (UNDESA). As mandated by *UN GA resolution 70/299* "Follow-up and review of the 2030 Agenda for Sustainable Development at the global level"(2016),[33] this body acts as the Secretariat for SDGs, focusing on providing substantive support and capacity building to the 17 Sustainable Development Goals and their related thematic issues, including water, energy, climate, ocean, urbanization, transport, science and technology, the Global Sustainable Development Report (GSDR), partnerships and Small Island Developing States.[34] DSDG plays a key role in the evaluation of UN systemwide implementation of the 2030 Agenda and on advocacy and outreach activities relating to the SDGs. In order to make the 2030 Agenda a reality, the SDGs have to be translated into a strong commitment by all stakeholders to implement the global goals. DSDG aims to help facilitate this engagement.[35]

1.1.3 The Principle of Sustainable Development as a Specific Dimension of Binding International Environmental Law Treaties

The principle of sustainable development also finds expression in a far from negligible number of international treaties. It is included in over 300 con-

[31] UN General Assembly: Format and organizational aspects of the high-level political forum on sustainable development, UN Doc. A/RES/67/290 (2013), 9 July 2013.

[32] High-Level Political Forum on Sustainable Development. See website: https://sustainabledevelopment.un.org/hlpf (quoted 1 July 2022).

[33] UN General Assembly: Format and organizational aspects of the high-level political forum on sustainable development, UN Doc. A/RES/67/290 (2013), 9 July 2013.

[34] United Nations: Division for Sustainable Development Goals. See website: https://www.un.org/development/desa/en/about/desa-divisions/sustainable-development.html (quoted 1 July 2022).

[35] United Nations: Sustainable Development Goals. See website: https://unosd.un.org/content/sustainable-development-goals-sdgs (quoted 1 July 2022).

ventions, and a brief survey of these is revealing from the point of view of the categories of conventions at stake, the location of the proposition relating to sustainable development, and the function attributed to it. References to sustainable development can indeed be found in 112 multilateral treaties, roughly 30 of which are aimed at universal participation.[36]

This shows a certain level of consensus among the international community concerning the relevance of sustainable development for international law. But what is particularly significant about the inclusion of sustainable development in conventional law is the location of this inclusion. A common impression among international lawyers is that even though sustainable development receives recognition in a great number of treaties, this recognition is of little legal significance since such references are mainly confined to the preamble, which is not binding. However, an empirical analysis shows that 207 of these references are to be found in the operative part of the conventions which is technically binding on the parties.[37]

Virgine Barral in this respect states that sustainable development has widely penetrated treaty law. However, unlike in non-binding instruments such as the Rio Declaration, the formulation of provisions relating to sustainable development in formally binding international treaties can be rather flexible. The wording can be vague and imprecise, characterized by the use of the conditional, and the provisions are often closer to setting out an incentive than purporting to be strictly constraining. For some, because of their softness, such provisions would be incapable of giving rise to valid rules of international law. However, the softness of the obligation set out in a treaty provision should not be an obstacle to its validity and binding legal nature.[38]

As an example of the treaty provisions on the principle of sustainable development we can state relevant provisions of some of the most important international environmental law treaties such as Convention on Biological Diversity (1992), Framework Convention on Climate Change (1992) and United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994).

[36] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 384, ISSN: 0938-5428.

[37] *Ibid*.

[38] *Ibid.*

Convention on Biological Diversity (1992)[39] contains main provision on the principle of sustainable development in its Article 1 which reads: "*The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.*"

United Nations Framework Convention on Climate Change (1992)[40] anchors main provision on the principle of sustainable development in its Article 2. This article reads: "*The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*"

United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994)[41] contains main provision as for the principle of sustainable development in its Article 2 (1). This article reads: "*The objective of this Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas*".

[39] *Convention on Biological Diversity* (1992), 1760 UNTS 79.

[40] *United Nations Framework Convention on Climate Change* (1992), 1771 UNTS 107.

[41] *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (1994), 1954 UNTS 3.

1.1.4 Case Law of International Judicial and Arbitral Bodies as for the Principle of Sustainable Development

Sustainable development was recognised as an international legal term by the ICJ in the Project Gabčíkovo – Nagymaros case (1997), and as having practical legal consequences by the WTO Appellate Body in the Shrimp/Turtle case (1998). Since then, other cases have sought to give effect to the concept, including the Iron Rhine case (2005) and the ICJ decision in Pulp Mills (2010).[42]

The first case dealing with the principle of sustainable development was the *Gabčíkovo-Nagymaros Project case* (1997).[43] In that dispute Hungary was mainly motivated by environmental concerns (the impact of the construction of the dams), whereas Slovakia wanted to carry out a project fuelling economic development. For the Court, since sustainable development *"aptly expresses"* the need to reconcile economic development with protection of the environment, the parties had to find an agreed solution to give effect to the Treaty. In doing so they needed to *"look afresh at the effects on the environment of the operation of the Gabčíkovo power plant"* and *"in order to evaluate the environmental risks, current standards must be taken into consideration"*. Sustainable development here requires a balancing of opposite considerations, a balancing of environmental considerations against the duty to give effect to a treaty in force requiring the construction of the dams, according to the *pacta sunt servanda* rule.[44]

Shrimp–Turtle case (1998)[45] is an excellent example of the Appellate Body using sustainable development as a legitimizing factor for evolutive treaty interpretation. The drafting history of Article XX(g) GATT indicated that the term 'exhaustible' natural resources was associated with non-living resources, thus a priori excluding sea turtles from its protection. However, for the Appellate Body, the words of Article XX(g) 'must be read by a treaty in-

[42] SANDS, P., PEEL, J., FABRA, A., MACKENZIE, R.: *Principles of International Environmental Law. Third Edition.* Cambridge: Cambridge University Press, 2012, p. 9–10, ISBN: 978-0-521-14093-5.

[43] *Gabčíkovo-Nagymaros Project case*, Hungary v Slovakia, Judgment, I. C. J. Reports 1997, p. 7.

[44] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 395–396, ISSN: 0938-5428.

[45] *Shrimp–Turtle case*, USA v. India, Malaysia, Thailand and Pakistan, WTO case Nos. 58 (and 61). Ruling adopted on 6 November 1998.

terpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'. And that is because the WTO Agreement preamble showed that its signatories 'were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy' as this preamble explicitly acknowledges "the objective of sustainable development".[46]

Sustainable development is again used as a rule of conflict resolution in the *Iron Rhine case* (2005),[47] where it was used to moderate the harsh effects of a strict application of the terms of an old treaty. According to an 1839 Treaty of Separation, Belgium maintained a right of transit through Dutch territory and on the basis of this requested the reactivation of the Iron Rhine railway line. The Netherlands argued that such reactivation had to be subject to a range of environmental protection measures not envisaged by the Treaty. Despite the treaty's silence, the tribunal concluded that, since sustainable development and the principle of integration require the prevention and mitigation of environmental damage in carrying out economic development projects, Dutch environmental protection measures were legitimate and had to be integrated into the project, thus balancing opposing interests in favour of environmental considerations.[48]

In the *Pulp Mills case* (2010)[49] the ICJ also went as far as to redefine the terms of Article 27 of the Statute of the River on the basis of sustainable development, although this did not lead to immediate legal consequences. Article 27 provides *that "the right of each Party to use the waters of the river… shall be exercised without prejudice to the application of the procedure laid down in articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters"*. Unsurprisingly for a treaty concluded in 1975, this provision makes no mention of sustainable development, yet for the Court it is this objective that it conveys. Indeed, in the Court's view, Article 27 'reflects … the need to strike a balance between the use of the waters and the

[46] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 395, ISSN: 0938-5428.

[47] *Iron Rhine Arbitration*, Belgium v Netherlands, Award, ICGJ 373 (PCA 2005), 24th May 2005, Permanent Court of Arbitration.

[48] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 396, ISSN: 0938-5428.

[49] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14.

protection of the river consistent with the objective of sustainable development' and adds that it 'embodies this interconnectedness between economic development and environmental protection that is the essence of sustainable development.'[50]

1.1.5 The Principle of Sustainable Development as a Part of Customary International Law

Academic objection to the existence of a general rule of customary international law relating to sustainable development has been fierce and is based on a variety of arguments. If some see enough evidence of *opinio juris* and state practice to prove the existence of a customary rule, be it a very abstract and general one that requires case by case concretization, others avoid this difficult question by emphasizing that the relevance of sustainable development is to be found elsewhere than in its legal nature and notably in the influence it exerts on international law as a new branch of that discipline.

The most powerful objection to sustainable development's customary status has been articulated by Lowe, for whom there is, in the catalogue of treaty provisions, declarations and so on that use the term "sustainable development", a lack of clear evidence that the authors regarded the concept as having the force of a rule or principle of customary international law. Lowe reaches this conclusion because treaty and other provisions relating to sustainable development lack fundamentally norm creating character and cannot, as such, form the basis of a general rule of international law. In his view only a formula such as "states must develop sustainably" would have this character.[51]

Yet another stream of commentary denies that sustainable development has reached the stage of being a customary norm or is even capable of that.[52] As it was shown above, the relevance for international law of sustainable development has been acknowledged by judicial or arbitral decisions. Judges

[50] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 397, ISSN: 0938-5428.

[51] See LOWE, V.: *Sustainable Development and Unsustainable Arguments*. In: BOYLE, A., FREESTONE, D. (eds.).: *International Law and Sustainable Development: Past Achievements and Future Challenges*. Oxford: Oxford University Press, 1999, p. 19, ISBN: 978-01-982-980-76.

[52] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 385, ISSN: 0938-5428.

and arbitrators have not gone so far as to clearly recognize its customary nature, although they came close to it on one occasion. Namely, the status of principle of sustainable development as customary rule is directly supported by an arbitral decision in the *Iron Rhine case* (2005). The arbitral tribunal was of the view that international law today *"require[s] the integration of appropriate environmental measures in the design and implementation of economic development activities"*, and that this integration requirement means that *"where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm"*, which *"has now become a principle of general international law"*.[53]

However, this is the only one case law in this respect. In the absence of absolutely clear judicial recognition of its customary nature, one can still test whether sustainable development meets customary requirements which, according to Article 38(1)(b) of the ICJ Statute, are the existence of a general practice (state practice), accepted as law (*opinio juris*).

Virginie Barral in this sense states, that there is general state practice as for the principle of sustainable development shown by great number of resolutions, declarations, gentlemen's agreements, programmes of action, international and national judicial decisions, national legislation, and conventional provisions referring to it, at least in so far as these formulations are in the form of sufficiently similar legal rules. Clearly provisions relating to sustainable development vary sometimes greatly from one instrument to another. However, there is still an overarching coherence between them as sustainable development is almost always defined as an objective to aspire to. These many legal acts also constitute useful precedents in the formation of a general practice relating to this *opinio juris*, to the extent that states' conduct is in line with them.[54]

Because of these reasons it is logical to agree with the view of Virginie Barral that, despite clear judicial confirmation, it can be concluded that the principle of sustainable development, as an objective, already constitutes a principle of customary law, even if this principle is a very general one, with a high degree of abstraction and which requires case by case substantiation.[55]

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[53] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 RIAA (2005) 35, at para. 59.

[54] BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 388, ISSN: 0938-5428.

[55] *Ibid*., p. 388.

1.1.6 The Precautionary Principle and the Environmental Impact Assessment as the Most Important Means of Contribution the Practical Application the Principle of Sustainable Development

International environmental law science views show that there are several principles of international environmental law supporting the practical application the principle of sustainable development. Among them the precautionary principle and the environmental impact assessment are considered as the most important means of contribution to the practical application the principle of sustainable development.[56]

Precautionary principle is closely related to the other international environmental law principle of prevention. In its best-known form, it was formulated in Principle 15 of the United Nations Declaration on Environment and Development (1992), which states that "*States should take precautionary approaches to the protection of the environment in accordance with their capabilities. Where there is a risk of serious or irreparable damage, the lack of scientific certainty must not be exploited to delay effective measures that could prevent damage to the environment.*" This principle later appeared in most of the new, subsequently adopted international treaties in the field of environmental protection[57] and is a generalization of their provisions in this area. In the theory of international law is gradually gaining ground the view that this principle has in the meantime become part of customary normativity.[58] According to other views, its definitive enforcement as a customary rule of international law is hindered by its inconsistent interpretation and economic implications for states and businesses.

This principle is in fact interpreted in two ways. The first interpretation corresponds to the wording of Principle 15 of the *United Nations Declaration on Environment and Development* (1992) and is based on the premise that a lack of scientific certainty must not lead to the postponement of environmental protection measures. This method of interpretation was confirmed in

[56] See, for example, VIRIYO, A.: *Principle of Sustainable Development in International Environmental Law,* 22 August 2012, p. 6–13, Online: https://ssrn.com/abstract=2133771 or http://dx.doi.org/10.2139/ssrn.2133771 (quoted 1 July 2022).

[57] ŠTURMA, P.: *Zásady mezinárodního práva životního prostředí*. In: Acta Universitatis Carolinae Iuridica, Vol. 2–3, 2002, p. 21, ISSN: 0323-0619.

[58] MCINTYRE, O., MOSEDALE, T.: *The Precautionary Principle as a Norm of Customary International Law*. In: Journal of Environmental Law, Vol. 9, Issue 2, 1997, p. 241, ISSN: 0952-8873.

the case of the *Gabčíkovo-Nagymaros Project* (1997). The second, much more radical way of interpretation is based on the approach that the state must give up activities that could cause environmental damage, even if existing scientific means do not make it possible to demonstrate to what extent these activities could be harmful.[59] Such a way of interpretation also results in the burden of proof being transferred to the State, which is the alleged of causing the damage, that it has taken all conceivable precautionary measures, regardless of their necessity, justified by current scientific knowledge.[60] This way of interpreting the precautionary principle has been used by the International Tribunal for the Law of the Sea (ITLOS) in the combined cases of *Southern Bluefin Tuna* (1999).[61] ITLOS in this case, resolved a dispute between Australia and New Zealand, on the one hand, and Japan, on the other, concerning the application of the *Convention for the Conservation of Southern Bluefin Tuna* (1993),[62] which was concluded between those States. This Convention lays down the maximum possible hunting limits for the Contracting States. Japan increased this limit on the grounds that hunting above the limit was experimental. Australia and New Zealand did not agree with this approach, invoking the precautionary principle. ITLOS complied with the complaining States and applied the broader concept of the precautionary principle, in the spirit of which it shifted the burden of proof to take all conceivable precautionary measures, regardless of their necessity, justified by current scientific knowledge to Japan[63] and took interim action to stop overfishing by Japan. At the same time, the ITLOS confirmed that the precautionary principle is part of international customary law.[64]

Under the principle, the States would take the anticipatory measures such as regulatory actions on the development projects, where there is potentiality

[59] ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo veřejné.* 2. vydání. Praha: C. H. Beck, 2018, p. 207, ISBN: 978-80-7400-721-7.

[60] ŠTURMA, P., DAMOHORSKÝ, M., ONDŘEJ, J., ZÁSTĚROVÁ, J., SMOLEK, M.: *Mezinárodní právo životního prostředí, I. část (obecná).* Beroun: IFEC – Eva Rozkotová, 2004, p. 96, ISBN: 80-903409-2-X.

[61] *Bluefin Tuna Cases*, New Zealand v Japan, Australia v Japan, Order, Request for Provisional Measures, ITLOS Cases No 3 and 4, (ITLOS 1999), 27th August 1999, International Tribunal for the Law of the Sea (ITLOS).

[62] *Convention for the Conservation of the Southern Bluefish Tuna (1993).* UNTS 1994, Vol. 1819, 1-31155.

[63] KAZHDAN, D.: *Precautionary Pulp: Pulp Mills and the Evolving Dispute Between International Tribunals over the Reach of the Precautionary Principle*. In: Ecology Law Quarterly, Vol. 38, 2011, p. 534, ISSN: 0046-1121.

[64] *Ibid*., p. 533.

of environmental consequences and there is no need for scientific certainty. As a result this would assist the States in making decision to balance between the economic development and the environmental protection. Therefore, the principle can be a basis for the States to obtain the sustainable development.[65]

Environmental impact assessment as a legal institute is a part of the international environmental law principle of prevention altogether with a legal institute of permanent monitoring of the state of the environment. Generally, an environmental impact assessment (EIA) can be described as a study of the adverse consequence, which a planned projects may have on the environment. There are two main important functions on which EIA process operate to achieve its objective. Firstly, the findings of EIA can be seen as the report, which affects the decision whether the development projects should be implemented. It also suggests whether the projects should be modified to minimise the consequences on the environment. Secondly, EIA process encourages the public participation. In addition to a public group of people who may be affected by the implementation of the projects, Non-Governmental Organisations (NGOs) have important roles in contributing to the EIA process.[66]

As for the legal status of EIA it is to say that several international conventions have incorporated the requirement of EIA. There is evidence even of its existence as a part of customary international law. Customary character of this legal institute, as a part of the principle of prevention, was confirmed by International Court of Justice in the *Pulp Mills case* (2010).

EIA provides a valuable process to the sustainable development. Before the development projects commences or during its operations, the EIA ensures that the environmental consequences will be considered. EIA provides a mechanism through which the consideration of environmental protection will have an influence on the economic development. Therefore, the EIA can contribute to the achievement of sustainable development.[67]

[65] VIRIYO, A.: *Principle of Sustainable Development in International Environmental Law*, 22 August 2012), p. 9. Online: https://ssrn.com/abstract=2133771 or http://dx.doi.org/10.2139/ssrn.2133771 (quoted 1 July 2022).

[66] MARONG, A. B. M.: *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable development.* In: Georgetown International Environmental Law Review, Vol. 16, No. 1, 2003, p. 70, ISSN: 1042-1858.

[67] VIRIYO, A.: *Principle of Sustainable Development in International Environmental Law*, 22 August 2012, p. 13. Online: https://ssrn.com/abstract=2133771 or http://dx.doi.org/10.2139/ssrn.2133771 (quoted 1 July 2022).

1.2 The Principle of Sustainable Development as a Part of International Development Law

The existence of international development law has arisen as a product of broader interpretation of one of the primary purposes of the United Nations (UN) embodied in article 2 section 3 of the *UN Charter* (1945). This purpose is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character. Thus, in the past four decades, the international community, led by the developing nations, has sought to remedy existing problems of underdevelopment. The emergence of politically independent developing countries in the post-war era has had an impact on the present state of international law. The attainment of political independence by these countries brought into focus the economic disparities in the international system and the accompanying issue of "economic self-determination."[68] International community started to seek a more equitable international economic system to adequately reflect the needs and aspirations of the developing countries. Gradually, in order to solve this problem, a new discipline in contemporary international law referred to as "*international development law*" emerged.

The concept of the law of development as a new discipline in contemporary international law can be traced to the writings of the Professor Wolfgang Friedmann. Friedmann described the law of international economic development as a body of law which must concern itself not only with the minimum principles adequate for the legal protection for foreign investment, but also with the principles protecting national control of natural resources, as well as with matters pertaining to the policies, methods and structures of international financing of economic development.[69]

International development law is a compendious term for several new but interrelated principles in international law. Its precise scope, content and substance are still emerging. A review, however, of the texts of bilateral and multilateral agreements, UN declarations and resolutions, as well as an examination of the practice of major development actors reveals that specific norms have crystallized. The most important of these include the duty of states to

[68] KWAKWA, E.: *Emerging International Development Law and Traditional International Law – Congruence or Cleavage?* In: The Georgia Journal of International and Comparative Law. Vol. 17, No. 3, 1987, p. 431, ISSN: 0046-578X.

[69] FRIEDMAN, W.: *The Changing Dimensions of International Law*. In: Columbia Law Review. Vol. 62, No. 7, 1962, p. 1147, ISSN: 0010-1958.

cooperate for global welfare, the principle of preferential treatment for developing countries, the principle of entitlement of developing countries to need based development assistance.[70]

Later, the international community produced supplementary concept of *"the right to development"* and *"The New International Economic Order"* as a new integral parts of international development law. The Brundtland report and all the following documents and treaties (as analysed above) implemented to the international development law another new dimension of legal arrangement – the concept of principle of sustainable development. This principle has interdisciplinary character, and its normative contents create for States undertakings in the field of environmental protection and in the area of development, as well. Both international environmental law and international development law have several common sources. However, the science of international environmental law is focused on environmental level of this principle. Similarly, the science of international development law is focused on development level of this principle. To get the complex view on this principle international law must integrate knowledges as for this principle from both mentioned branches of international law.

1.3 The Conceptual Content of the Principle of Sustainable Development as a Common Principle of International Environmental Law and International Development Law

Modern understanding of the concept of principle of sustainable development, and its recognition at the International Community level, is largely the result of a vast UN-led promotion operation. This operation officially started in 1972 with the Stockholm Conference on the Human Environment. Although *"sustainable development"* was not yet mentioned, the link between environmental protection and economic development was clearly established in the Stockholm Declaration of Principles. The most fundamental landmark in sustainable development's history is, however, certainly the 1992 Rio Conference on Environment and Development and its famous Declaration of Principles which brings sustainable development within the legal sphere. Although non-binding, the principles of the Rio Declaration are formulated in

[70] KWAKWA, E.: *Emerging International Development Law and Traditional International Law – Congruence or Cleavage?* In**:** The Georgia Journal of International and Comparative Law, Vol. 17, No. 3, 1987, p. 436, ISSN: 0046-578X.

strong legal terms.[71] These principles identified *two pillars* of the sustainable development – *environmental protection and economic development*.

The Earth Summit Rio + 5 (1997) added to the concept of the principle sustainable development the *third social pillar*. In the resolution *UN General Assembly resolution* S-*19/2 "Programme for the Further Implementation of Agenda 21"* (1997), adopted at this summit, UN General Assembly affirmed that environmental protection, economic development, and social development were three interdependent dimensions of sustainable development.

The United Nations Millennium Summit in September 2000 at UN Headquarters in New York of the UN member States unanimously adopted the *Millennium Declaration*. The Summit led to the elaboration of eight Millennium Development Goals (MDGs) to reduce extreme poverty by 2015.

Previous approaches were later confirmed and generalized at the *Johannesburg Summit for Sustainable Development* in 2002, which, together with a strong emphasis on implementation, is the core added value of a summit which otherwise failed to replicate the Rio success.[72] *The Rio +20 Conference on Sustainable Development* held in June 2012 did not add more to this concept. The International Community and the UN considered the matter more or less settled after the Johannesburg Summit. The UN General Assembly resolution *"Transforming Our World: Agenda 2030 for Sustainable Development"* (2015), known as *"Agenda 2030"*, is in fact a plan of sustainable development with a set of 17 so called *"Sustainable Development Goals"*. This resolution, adopted in soft law form, identified how to reach the three basic pillars of sustainable development.

The principle of sustainable development, beyond the texts already mentioned, also found its way into a plethora of Declarations of States, Resolutions of International Organizations, and, crucially, international Treaties. It is these founding texts, and particularly the Rio Declaration, that lay out the core conceptual content of sustainable development.

Virginie Barral underlines that a synthesis of these core documents shows that the meaning of *"sustainable development"* can be reduced to the combination of two principles that can be seen as axiomatic to understanding sustainable development: intergenerational and intragenerational equity. *Intergenerational equity* refers to the first dimension of the proposition and relates

[71] BARRAL, V.: Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm. In: *The European Journal of International Law*, No. 2, Vol. 23, 2012, p. 379, ISSN: 0938-5428.

[72] *Ibid*., p. 380.

to the adjective *"sustainable"*. This principle is at the core of the Brundtland Report's definition and is also included in principle 3 of the Rio Declaration. It posits that in their development choices states must preserve the environmental capital they hold in trust for future generations and ensure that it is transmitted in conditions equivalent to those in which it was received. *Intragenerational equity* refers for its part to the second dimension of the expression, the *"development"* part, and requires equity in the distribution of the outcomes of development within one generation as much internally (within one national society) as internationally (between developed and developing states).[73]

Barral further states that development will be sustainable only when both intergenerational (environmental protection) and intragenerational (fair economic and social development) equity are guaranteed, and this is to be achieved through their integration. This requirement is particularly well illustrated in principle 4 of the Rio Declaration. Reconciliation of environmental protection and economic and social development, through their integration, is commonly seen as the core philosophy underlying the concept.[74]

Collective of authors leaded by Professor Philippe Sands insist that the term *"sustainable development"* used in the Brundtland report contains within two other concepts: the concept of "needs", in particular needs of the world´s poor, to which overriding priority should be given and the idea of limitations imposed, by the state of technology and social organisation, on the environment´s ability to meet the present and future needs.[75]

Sands and collective of authors further insist that the later adopted binding treaties added to this concepts four recurring elements: (1) the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity); (2) the aim of exploiting natural resources in a manner which is *"sustainable", "prudent", "rational", "wise" or "appropriate"* (the principle of sustainable use); (3) the *"equitable"* use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use, or intragenerational equity); and (4) the need to ensure that environmental considerations are integrated into economic and other (social) development plans, programmes and projects,

[73] *Ibid.*

[74] *Ibid*., p. 380–381.

[75] SANDS, P., PEEL, J., FABRA, A., MACKENZIE, R.: *Principles of International Environmental Law. Third Edition*. Cambridge: Cambridge University Press, 2012, p. 206, ISBN: 978-0-521-14093-5.

and that development needs are taken into account in applying environmental objectives (the principle of integration). These four elements are closely related and often used in combination (and are frequently interchangeably), which suggests that they do not yet have a well-established, or agreed, legal definition or status.[76]

The ideas presented by collective leaded by Professor Sands are in some way overlapping with the views of Virginie Barral but bring some new levels of the concept of the principle of sustainable development.

Conclusion

The principle of sustainable development invented in the scope of the Brundtland report (1987) was implemented into international environmental law and international development law by plethora of non-binding soft law documents, declarations of states, resolutions of international organizations, and, crucially, international multilateral treaties. The relevance for international law of sustainable development has been acknowledged by judicial or arbitral decisions.

As the case law of international judicial and arbitral bodies shows, the principle of sustainable development is undeniably a very powerful hermeneutical tool in the hands of judges, as it can be used to weigh on the interpretation of existing norms. Having resort to sustainable development in the interpretation process may not only legitimize a dynamic interpretation of treaty rules, but in certain circumstances lead the judge to go as far as to revise the treaty. These outcomes are the result of the integration of, generally, environmental norms into a treaty that did not necessarily take them into account, as well as of the balancing exercise between conflicting norms and interests that sustainable development requires. Sustainable development's interpretative function is thus particularly significant for the power and degree of liberty it grants judges.[77]

Judges and arbitrators have not gone so far as to clearly recognize its customary nature, although they came close to it on one occasion. Namely, the status of principle of sustainable development as customary rule is directly supported by an arbitral decision in the *Iron Rhine case* (2005). International

[76] *Ibid*.

[77] See BARRAL, V.: *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*. In: The European Journal of International Law, Vol. 23, No. 2, 2012, p. 398, ISSN: 0938-5428.

environmental law science identified even related international environmental law customary principles supporting application of this principle. These principles include the precautionary principle and the environmental impact assessment as the most important means of contribution the practical application the principle of sustainable development.

The founding international law texts, and particularly the Rio Declaration (1992) and the Declaration of the Earth summit (1997), lay out the core conceptual content of sustainable development. Taking in account provisions of these documents and approaches of the international law science, under our opinion, the conceptual content of the principle of sustainable development contains elements as it follows:

1 *The principle of intergenerational equity* based at the idea of the need to preserve natural resources for the benefit of future generations;
2 *The principle of intragenerational equity or equitable use* coming up from the idea of the *"equitable"* use of natural resources, which implies that use of natural resources by states must take account of the needs of own generation as internally (within one national society) as internationally (between developed and developing states);
3 *The principle of sustainable use* based on the aim of exploiting natural resources in a manner which is *"sustainable", "prudent", "rational", "wise" or "appropriate"*;
4 *The principle of integration* the need to ensure that environmental considerations are integrated into economic and social development plans, programmes and projects, and that economic and social development needs are taken into account in applying environmental objectives. By the other words the sustainable development has three levels which should by coordinated to each other – environmental, economic and social level.

The later accepted non-binding United Nations Millenium Summit Declaration (2000) fixed Millenium Development Goals to supplement concept of the sustainable development by practical goals. These goals were changed by the other non-binding Resolution "Agenda 2030" (2015) which fixed new version of so-called Sustainable Development Goals (SDGs). It seems that the international community has guidelines how to realize the principle of sustainable development in practice. However, if we will analyse the SDGs one by one it is not sure if all of them are realistic to be implemented to the practice. But that is another story to talk about…

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2 THE CONTRIBUTIONS OF UN HUMAN RIGHTS TREATY-BODIES TO REALIZATION OF "GREEN AMBITIONS AND SUSTAINABLE DEVELOPMENT"

Vasilka Sancin

Abstract

The paper discusses the work of the Human Rights Treaty Bodies (HRTBs) with climate change – human rights nexus, which can significantly contribute to the realization of Sustainable Development Goals that are essentially based on human rights. It first lays out the contours of relevant international legal framework for HRTBs decision-making on climate change related human rights issues. It then turns to the critical legal analysis of recent developments within the selected HRTBs, and concludes with assessment of the progress achieved so far and identification of actual and potential challenges going forward.[1]

Introduction

The 2030 Agenda for Sustainable Development,[2] adopted by all United Nations Member States (*hereinafter* UN MS) in 2015, with its 17 Sustainable Development Goals (*hereinafter* SDGs), calls for an urgent action by all countries in a global partnership. Two important underlying themes for the realization of the SDGs are human rights and preservation of the environment, including tackling of the climate change.[3] Addressing climate change is also a specific focus of Goal 13: *Take urgent action to combat climate change and its impacts.*[4]

[1] The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)".

[2] Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

[3] *See* also: ATAPATTU, S.: Human Rights Approaches to Climate Change, Challenges and Opportunities, 1st edition, London: Routledge.

[4] *See* also: BOYLE, A.: Climate Change, Sustainable Development, and Human Rights, pp. 171–189. Online: https://library.oapen.org/bitstream/handle/20.500.12657/22942/1007219.pdf?se#page=179 (quoted 1 July 2022).

It has been recognized, that the SDGs are based on human rights (over 90 percent of the goals and targets of the SDGs correspond to human rights obligations) and when UN MS make progress on the SDGs, they make progress on their human rights obligations – making SDGs and human rights two sides of the same coin.[5] The challenge, as with all other international commitments, is the lack of their genuine and timely implementation in practice.[6] Additional six years were needed for the UN Human Rights Council (*hereinafter* HRC) to recognize, in October 2021, the right to a clean, healthy, and sustainable environment (HRC resolution 48/13). On 28 July 2022 UN General Assembly adopted a historic resolution, recognising for the first time, that everyone, everywhere, has a human right to live in a clean, healthy and sustainable environment (A/RES/76/300). The UN Special Rapporteur on human rights and the environment, David R. Boyd, said that "the resolution has the potential to be a turning point for humanity, improving the life and enjoyment of human rights of billions of individuals as well as the health of our extraordinary planet".[7] There is hope that this development will be a catalyst for more ambitious climate action and progress towards environmental justice, just as was in the case of the recognition of the rights to water and sanitation by the UB General Assembly in 2010, that sparked a range of positive and transformative changes in laws, policies and outcomes around the world.

In any event, the right is already protected explicitly under the Convention on the Right of the Child (article 24, discussed further below) and directly relevant to other UN human rights treaties.

[5] RATTRAY, S.: Human rights and the SDGs – two sides of the same coin. Blog of the United Nations Development Programme, 5 July 2019. Online: https://www.undp.org/blog/human-rights-and-sdgs-two-sides-same-coin?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQjw2_OWBhDqARIsAAUNTTErSoRFHPziN54BZEX5wtshog6T3hLSaiMYDAupZsa2sLJkamaHZlgaAkYcEALw_wcB (quoted 1 July 2022).

[6] *See for example* POGGE, T. and SENGUPTA, M.: Assessing the sustainable development goals from a human rights perspective, Journal of International and Comparative Social Policy, Volume 32, Issue 2: Special Issue: Social Policy and the Transformative Potential of the SDGs, June 2016, pp. 83–97.

[7] Human rights treaty bodies and their role supporting the 2030 Agenda. Online: https://sustainabledevelopment.un.org/index.php?menu=3170&nr=201&page=view&type=30022 (quoted 1 July 2022).

Human rights treaties are particularly relevant to the principle of "ensuring that no one is left behind".[8] The International Covenant on Civil and Political Rights (*hereinafter* ICCPR) and the International Covenant on Economic, Social and Cultural Rights (*hereinafter* ICESCR) include the principle of non-discrimination in articles 2 of each treaty and they share common article 3 promoting equality between men and women. Other main human rights treaties (Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, International Convention on the Rights of the Child, International Convention on the Rights of Persons with Disabilities, International Convention for the Protection of All Persons from Enforced Disappearance) focus on the rights of persons who are often left behind, including women, children, persons with disabilities, indigenous peoples, national, ethnic and racial minorities, persons in detention, migrant workers, and people suffering enforced disappearance.[9]

Each treaty establishes a body of independent experts – currently ten Human Rights Treaty Bodies (*hereinafter* HRTBs) or Committees[10] – elected by

[8] Human rights treaty bodies and their role supporting the 2030 Agenda. Online: https://sustainabledevelopment.un.org/index.php?menu=3170&nr=201&page=view&type=30022 (quoted 1 July 2022).

[9] *See* also: MÉGRET, F. and ALSTON, P. (eds.): The United Nations and Human Rights, A Critical Appraisal, Second Edition. Oxford, Oxford University Press, 2020.

[10] These are the Committee on Civil and Political Rights (*hereinafter* CCPR) under the 1966 ICCPR, the Committee on Economic, Social and Cultural Rights (*hereinafter* CESCR) monitoring the 1966 ICESCR, the Committee on the Elimination of Racial Discrimination (*hereinafter* CERD) under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Discrimination against Women (*hereinafter* CEDAW) under the 1979 Convention on the Elimination of Discrimination against Women, the Committee against Torture (*hereinafter* CAT) under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (*hereinafter* SPT) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee on the Rights of the Child (*hereinafter* CRC) under the 1989 Convention on the Rights of the Child, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (*hereinafter* CMW) under the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of Persons with Disabilities (*hereinafter* CRPD) under the 2006 Convention on the Rights of Persons with Disabilities,

States parties. These HRTBs are mandated to review implementation of the treaties and make recommendations. Nine human rights treaties have a reporting procedure which requires States parties to provide reports setting out steps taken to implement the treaties. In June 2022, all the treaty-body chairs reached a historic consensus on the 8-year predictable review cycle (*hereinafter* PRC).[11] According to it, as soon as implemented, the States parties should be reviewed under each treaty only every eight years, one of the most significant developments under the process triggered by the UN General Assembly resolution 68/268 on *Strengthening and enhancing the effective functioning of the human rights treaty body system*.[12] The HRTBs examine each State report and replies to the List of Issues (*hereinafter* LOI) or List of Issues prior to reporting (*hereinafter* LOIPR) – the latter in accordance with its simplified reporting procedure, if accepted by a State party – and addresses their concerns and issue recommendations to the State party in the form of 'Concluding observations' (*hereinafter* COBs) after they have conducted a 'constructive dialogue'. All HRTBs should also develop procedures for follow-up on concluding observations (the CCPR has already firmly established procedure in this regard),[13] as these are an integral part of the reporting procedure. In the review process, in addition to information submitted by the State party, all available sources of information, including originating from other treaty bodies, special procedures, the Universal Periodic Review, the UN system, as well as from regional human rights mechanisms, national human rights institutions and civil society organisations, can be, and regularly are, considered.

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and the Committee on Enforced Disappearances (*hereinafter* CED) under the 2006 International Convention for the Protection of all Persons against Enforced Disappearance.

[11] Conclusions of the Chairs of the treaty bodies at the 34th meeting of the Chairs of the treaty bodies from 17 June 2022 (unpublished at the time of submission of this contribution) stipulate: , 6. All treaty bodies agreed to establish a predictable schedule of reviews. The Committees that have periodic reviews (CESCR, HRC, CERD, CEDAW, CAT, CRC, CRPD and CMW) will establish an eight-year review cycle for full reviews with follow-up reviews in between.' (para. 6). *See* also: 'The Geneva Human Rights Platform Welcomes Major Breakthrough For UN Treaty Bodies'. Online: https://www.geneva-academy.ch/news/detail/551-the-geneva-human-rights-platform-welcomes-major-breakthrough-for-un-treaty-bodies (quoted 29 June 2022).

[12] A/RES/68/268.

[13] See: Note on the procedure for follow-up to concluding observations. Available online: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f161&Lang=en (quoted 29 June 2022).

Treaty bodies also adopt general comments/recommendations and statements,[14] and, if accepted by the States Parties, decide on individual communications (complaints of violations of the treaty by States parties).

Therefore, the HRTBs promote a two-way interaction with the 2030 Agenda. On the one hand, the significant amount of information relating to the implementation of treaties gathered through the reporting process is closely related to the implementation of the SDGs and therefore provides a ready-made source of data to help track progress on SDG implementation. In addition, the information relating to national implementation of the SDGs is itself closely related to treaty implementation and therefore of particular relevance to the work of treaty bodies.[15]

In this regard, treaty bodies are regularly referring to relevant SDGs and targets in their constructive dialogues with States (for example, sending specific SDGs-related questions to States prior to the review of their treaty report, raising SDGs-related questions in the constructive dialogue with States and making recommendations to States in the concluding observations that link implementation of particular treaty provisions with SDGs and targets), including those related to protection of the environment and addressing the climate change.

Many specific activities have been undertaken also by the Office of the High Commissioner for Human Rights (*hereinafter* OHCHR), including through field presences directly helping States parties to align SDGs implementation and development of national development plans with treaty obligations and their treaty reporting.[16]

This contribution proceeds from the fact[17] that over the years, HRTBs have demonstrated that they fully recognize climate change as a pressing human rights issue and an important subject of their mandate, and have addressed the climate-human rights nexus in an increasing and progressively more systematic way. The thesis of this contribution, which looks particularly at the

[14] See also: SANCIN, V.: *General Comments and Recommendations*, in Binder, C., M. Nowak, J.A. Hofbauer and P. Janig (eds), Elgar Encyclopedia of Human Rights, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing (forthcoming 2022).

[15] *Ibid.*

[16] See also the Universal Human Rights Index. Online: http://uhri.ohchr.org/en (quoted 1 July 2022).

[17] States' Human Rights Obligations in the Context of Climate Change: Guidance Provided by the UN Human Rights Treaty Bodies, 2022 Update. Online: https://www.ciel.org/wp-content/uploads/2022/03/States-Human-Rights-Obligations-in-the-Context-of-Climate-Change_2022.pdf (quoted 1 July 2022).

HRTBs whose mandates relate most directly to climate change, namely the CCPR, CESCR, CRC, CEDAW, CRPD, CERD and CMW, is that there is, despite the interruptions caused by Covid-19 pandemic, a growing share of climate-change related work within the HRTBs, with a potential to significantly contribute to the realization of SDGs.

The method employed in this paper is doctrinal or non-empirical research, concretely, selection of legal doctrine in relation to the presented thesis, collection of data with respect to the HRTBs' work, analysis of the data collected, and, after critical legal analysis, provision of conclusions on the proposition initially set.

The paper first lays out the contours of relevant international legal framework for HRTBs decision-making on climate change related human rights issues. It then turns to the critical legal analysis of recent developments within the selected HRTBs. The paper concludes with assessment of the progress achieved so far and identification of actual and potential challenges going forward.

2.1 Human Rights Treaties and Climate Change

Each of the fundamental UN human rights treaties contains articles that can be directly or indirectly linked to the consequences of environmental degradation and, particularly relevant for this paper, impacts of climate change. In addition to the principle of non-discrimination and right to equal treatment underlying all of the treaties, the following are the rights and principles most relevant to climate change contained in the respective treaties and taken into consideration by the HRTBs.

The CCPR, just like the CESCR, can look into climate change actual or prospective impacts on peoples' right of self-determination, enshrined in article 1. It can address, or has already dealt with, such issues under article 6 on the right to life, article 7 on prohibition of torture and ill-treatment, right to family life under article 17, freedom to expression under article 19 and a right of peaceful assembly under article 21, especially in the context of climate change demonstrations. The CCPR can decide on climate change related issues also under article 25, when assessing the compliance with the right to take part in public affairs, and particularly in relation to minorities, under article 27 looking into the implementation of the right to culture.

The CESCR can act upon climate change effects on economic, social and cultural rights under article 2 which provides for an obligation to take steps

towards full realization of these rights. Further, particularly in relation to climate change effects on indigenous peoples, article 1 importantly provides for peoples' right of self-determination and to own means of subsistence. Also, rights, such as a right to an adequate standard of living, including food, water, and housing under article 11, right to health under article 12, and a right to science and culture under article 15 can be hampered by climate change impacts.

The CERD can, for example, tackle the issue of climate change effects on rights within the purview of this Committee mostly under article 2 on prohibition of racial discrimination and through obligation to eliminate racial discrimination in relation to all human rights under article 5. Given the lack of availability of effective domestic remedies to address concerns about climate change impacts on human rights in certain countries, it is important to mention also the right to remedy under article 6.

The CEDAW can analyse States Parties' implementation of their treaty obligations in relation to climate change mostly under article 2 which provides for an obligation to prohibit and eliminate discrimination against women and article 3, which requires them to ensure the full development and advancement of women. Particularly from the viewpoint of guaranteeing the rights of women in environmental and climate change decision making, it is relevant to mention also article 7, that entails a right to participation and article 14 providing for rights of rural women.

The CRC, in particular in light of the principle of intergenerational equity, can act upon obligation to respect and ensure the rights of children and to eliminate discrimination against children under article 2. The central guiding principle of the CRC's work, including in relation to climate change impacts on children is stipulated in artcile 3, i.e., the principle of best interests of the child. Furthermore, children can and do invoke in this context also their right to life under article 6 and freedom of expression under article 1. A rarity among the human rights treaties is an article, such as article 24, on the right to health, which explicitly recognizes that States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to, among others, 'combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution'. While the right to education can be monitored under article 28, article 29 explicitly states that States

Parties agree that the education of the child shall be directed to, among others, to 'the development of respect for the natural environment'. More so, the right to an adequate standard of living, including food, water, sanitation, and housing can be invoked under article 27.

The CRPD can exercise its mandate in relation to concerns arising out of climate change under the prohibition of discrimination against persons with disabilities prescribed in article 4 and obligation to consult. Furthermore, it can act so under article 10 containing the right to life, article 24, on the right to education, article 25 on the right to health, and article 29 on the right to adequate standard of living. Importantly, there is also explicit obligation to protect persons with disabilities in situations of risk and natural disasters under Article 11.

The CAT may be looking into climate change related claims also in connection to prohibition of refoulement to situations where individuals may be facing conditions of ill-treatment caused by climate change.

The CED may be looking in relation to the topic of this paper, particularly into enforced disappearances of climate change activists and human rights defenders, occurring also among members of indigenous communities.

A number of General Comments/Recommendations of various HRTBs contain references to climate change. In this respect, it is particularly relevant to mention that in 2021, the CRC started working on its next *General Comment (no. 26) on children's rights and the environment with a special focus on climate change*, addressing substantive, procedural, and heightened obligations owed to children.[18]

2.2 Recent developments within the work of the HRTBs

A comprehensive analysis of the work of all HRTBs contributing to realization of SDGs in relation to climate change surpasses the limits of this paper. Thus, the analysis of the data collected is limited to the last four years (2019–2022).

While the experience with Covid-19 pandemic seriously affected the HRTBs' work on many fronts, it has brought also some positive developments. One of this is the introduction of regular online briefings (in addi-

[18] Draft general comment No. 26 on children's rights and the environment with a special focus on climate change. Online: https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and (quoted 1 July 2022).

tion to in person ones) by the civil society organisations, which otherwise, may encounter difficulties reaching Geneva to interact with the Committees' members. This opportunity could in the future be even further explored and increasingly utilized by 'environmental' civil society organizations and other experts, who have so far not been usual participants in briefings of the HRTBs.

The Centre for International Environmental Law and the Global Initiative for Economic, Social and Cultural Rights report that in the times of the pandemic, the HRTBs issued fewer climate-related outputs in 2020 than in 2019 (when HRTBs made 61 references), but the number increased in 2021, exceeding those in any previous year.[19] In 2020, there were 54 references to climate change (11 COBs and 43 LOIs/LOIPRs) in the outputs made to States as part of the HRTBs' State reporting procedures. Nonetheless, this amounted to around 38% of the total number of outputs issued by the HRTBs in 2020, a rise from approximately 28% of the total outputs in 2019. In 2021, climate-related outputs amounted to 69 (22 COBs and 47 LOIs/LOIPRs), representing around 53% of the total number of outputs issued in 2021.[20] Since the HRTBs fully returned to in-person sessions in 2022 and are reviewing more States parties then previously during the Covid-19 period of on-line session, the number can be expected keep growing.

Taking the references to climate change as a proportion of all outputs to States by the HRTBs through the State reporting procedure (the CESCR, the CRC, the CEDAW, the CCPR, the CRPD, the CERD, the CMW – excluding the CED and the CAT) in 2020 and 2021 combined, 46% of all outputs address climate change (123 out of 269).[21]

Most HRTBs are now addressing matters related to climate change with the same frequency with all categories of States under review – those contributing more to climate change and those bearing most of the impacts in a more balanced manner. The HRTBs have made some very strong recommendations to wealthy countries with regards to their obligations to mitigate harms by reducing emissions and tackling fossil fuel extraction. Since 2020, 43 countries have received their first-ever recommendation or question on

[19] States' Human Rights Obligations in the Context of Climate Change: Guidance Provided by the UN Human Rights Treaty Bodies, 2022 Update, p. 2. Online: https://www.ciel.org/wp-content/uploads/2022/03/States-Human-Rights-Obligations-in-the-Context-of-Climate-Change_2022.pdf (quoted 1 July 2022).

[20] *Ibid.*

[21] *Ibid*, p. 5.

climate change from the HRTBs – including major economies such as Brazil, France, Indonesia, and South Africa, which confirms that the HRTBs are turning their attention beyond those countries most associated with climate change due to their vulnerability, such as Small Island Developing States, which had received the majority of such recommendations and questions in the past. Until recently, 146 States have received at least one COB, LOI, or LOIPR that mentions climate change. The rise in LOIs and LOIPRs with climate mentions indicates that there will be a significant number of COBs mentioning climate change in years to come.[22]

It is also important to mention that in September 2019, five HRTBs (CEDAW, CESCR, CMW, CRC and CRPD) issued a joint statement on human rights and climate change,[23] that highlights some of the emerging trends and themes when the HRTBs deal with human rights – climate change nexus. One such recurring theme is, for example, the implications of climate change to the enjoyment of the right to water.

Looking into jurisprudential developments, it must be highlighted that the CCPR in its November 2019 session adopted its Views in the *Teitiota v. New Zealand* communication,[24] the first ever decision by any HRTB directly addressing climate change. The case concerned a claim by a Kiribati family who had sought asylum in New Zealand on the grounds that the significant impacts of climate change on life in Kiribati will endanger their right to life (art. 6 of the ICCPR) should they return to the island. The Teitiota family argued that rising sea levels, serious flooding, scarcity of land and related land disputes, salination of drinking water sources, and destruction of crops, thereby depriving them of a means of subsistence, together posed a threat to their right to life. They contended that these climate-induced threats amounted to a real risk of irreparable harm to their lives in violation of Article 6 of the ICCPR, engaging New Zealand's obligations of non-refoulement. While accepting the author's claims that Kiribati would be uninhabitable within 10 to 15 years, the Committee found that Kiribati was taking adaptive measures to address the impacts of climate change, and there was sufficient time for it to do more to protect the author's right to life.

[22] For also graphic representation see: *Ibid*., pp. 5–8.

[23] Five UN human rights treaty bodies issue a joint statement on human rights and climate change. Online: https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and?LangID=E&NewsID=24998 (quoted 1 July 2022).

[24] CCPR/C/127/D/2728/2016.

It ultimately rejected the author's petition but stated that the effects of climate change could violate the right to life and trigger non-refoulement obligations on deporting States. It noted that States should continue to assess the data regarding the impacts of climate change and rising sea levels: 'given that the risk of an entire country becoming submerged under water is such an extreme risk, that the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.'[25] Two Committee members disagreed with finding of no violation and submitted their separate dissenting opinions.[26]

In October 2021, the CCPR adopted its second Views in relation to 'environmental cases' being brought against Paraguay. In the decision in the *Pereira Benega v. Paraguay*,[27] where the indigenous community of Campo Agua͠ẽ has suffered severe consequences from the fumigation of toxic pesticides by neighbouring large commercial operations. After lengthy and unsatisfactory administrative and judicial process in Paraguay, the community brought their case to the CCPR, which decided that Paraguay did not adequately monitor the fumigation and failed to prevent and control the toxic contamination of traditional lands, due to the intensive use of pesticides by nearby commercial farms, which violates the indigenous community's rights and sense of "home", in violation of articles 17 and 27, read alone and in conjunction with article 2(3) of the ICCPR. It recommended that Paraguay complete the criminal and administrative proceedings against all the parties responsible, make full reparation to the victims, take all necessary measures, in close consultation with the community, to repair the environmental damage, and take steps to prevent similar violations from occurring in the future. Three Committee members in their separate concurring opinion,[28] however regretted that one of the main issues at stake in this case, i.e. the consequences of the pollution on the right to life as protected by article 6 of the ICCPR was not raised by the parties or *proprio motu* by the CCPR. Namely, as highlighted in General Comment 36 and developed in *Portillo Cáceres v Paraguay* Views [finding violation of articles 6 and 17 of the ICCPRt, read

[25] *Ibid*., para. 9.11.

[26] Individual opinion of Committee member Vasilka Sancin (dissenting), annex 1; Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), Annex 2.

[27] CCPR/C/132/D/2552/2015.

[28] Individual opinion by Committee members Hélène Tigroudja, Arif Bulkan and Vasilka Sancin (Concurring), Annex 1.

alone and in conjunction with article 2 (3)],[29] the right to life cannot be 'interpreted narrowly' and encompasses the right to 'enjoy a life with dignity';[30] the Committee affirmed that '[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. […] These general conditions may include […] degradation of the environment, deprivation of land, territories and resources of indigenous peoples.'[31] This preventative aspect in relation to environmental degradation, which can be translated also into positive obligations of States in relation to climate change, is likely to be further scrutinized in future jurisprudence of the CCPR, including in the pending case before the CCPR in *Torres Strait Islanders v. Australia* (communication no. 3624/2019).

Furthermore, in 2021, the CRC issued their decisions on the *Sacchi et al. v. Argentina, Brazil, France, Germany, and Turkey* communication,[32] which related specifically to the duty of States to protect children from climate-induced harms. Sixteen children, among them teenage climate activist Greta Thunberg, filed a petition before the CRC alleging that the abovementioned States had violated their rights under the UN Convention on the Rights of the Child by making insufficient cuts to greenhouse gases and failing to encourage the world's biggest emitters to curb carbon pollution. According to petitioners, none of the States have made or kept commitments that align with keeping temperature rise and therefore violate their rights due to the perpetuation of climate change. They asked for actions that the States' parties must take to address climate change, specifically mitigation and adaptation measures. In its inadmissibility decisions of 22 September 2021, the Committee declared the Communication inadmissible, which is indicative of some of the procedural challenges that climate cases will face in the future. Whereas the Committee recognized that the authors of the Communication had victim status, and established that it had jurisdiction over the case, it found the case inadmissible for failure to exhaust domestic remedies. After detailed examination of the remedial possibilities in each State, it ultimate-

[29] CCPR/C/126/D/2751/2016.
[30] CCPR/C/GC/36, para. 3.
[31] CCPR/C/GC/36, para. 26.
[32] CRC/C/88/D/104/2019; CRC/C/88/D/105/2019; CRC/C/88/D/106/2019; CRC/C/88/D/107/2019; CRC/C/88/D/108/2019.

ly reached a finding of inadmissibility, noting that no domestic proceedings had been initiated in the respective States concerned.

The continued attention on climate change by the HRTBs, even during the pandemic, shift to online work enabling access to more participants, and rise of new issues of concern, demonstrates that the HRTBs recognize the imperative of urgently addressing the seriousness of climate change negative impacts on enjoyment of human rights.

Conclusion

The discussion above demonstrates that the HRTBs can play a critical role in guiding States in implementing and protecting human rights that might be, or already are, impacted by global effects of climate change in multiple forms, which in turn implicates consequences for the realization of SDGs and contributes to the determination of our common future.

As the climate crisis accelerates, the HRTBs should, wherever possible, highlight States' obligations to take action to prevent dangerous climate change, which severely impacts the enjoyment of human rights, and should continue to review the adequacy of States' climate policies and concrete actions, both in terms of mitigation and adaptation. Moreover, the HRTBs should increasingly remind the States parties of the obligations owed to their populations as a whole, but also to specific segments of the population, including indigenous communities and vulnerable communities of low-lying island States. One of the serious setbacks, however, are the growing backlogs of HRTBs in relation to their monitoring function, and particularly in case of the CCPR, also in relation to its quasi-jurisdictional function, as there is no time left to act in response to climate change.

Although, the extent to which different HRTBs look at climate change within the scope of their mandate still varies greatly, the jurisprudence and work of the HRTBs can inform the interpretation of human rights norms through the lens of climate change in cases being brought before the national and regional courts and tribunals. It is reasonable to expect that, given the urgency of action needed, individuals will be submitting more and more communications to relevant HRTBs alleging the unavailability or ineffectiveness of domestic remedies.

Finally, as the HRTBs can (and should regularly) interact also with HRC special procedures, it is important to follow also the developments in the

work of the Special Rapporteur on human rights and the environment,[33] and in even more directly relevant for the climate change impacts on human rights, the Special Rapporteur on climate change,[34] established by the HRC in October 2021 (RES/48/14). The work of this Special Rapporteur is supposed to further explore how climate change and human rights intersect and make recommendations to States and other stakeholders by preparing annual reports to the HRC and UN General Assembly, conducting country visits, and receiving communications, among other relevant activities. In this respect, HRTBs and the Special Rapporteurs should seize the opportunity to build on each other's work to further clarify States' human rights obligations in the context of climate change.

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[33] See: Special Rapporteur on human rights and the environment. Online: https://www.ohchr.org/en/special-procedures/sr-environment (quoted 1 July 2022).

[34] See: Special Rapporteur on climate change. Online: https://www.ohchr.org/en/specialprocedures/sr-climate-change (quoted 1 July 2022).

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8.) *Sacchi et al. v. Argentina, Brazil, France, Germany, and Turkey*, CRC/C/88/D/104/2019; CRC/C/88/D/105/2019; CRC/C/88/D/106/2019; CRC/C/88/D/107/2019; CRC/C/88/D/108/2019, 22 September 2021.

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3 WHAT IS THE IMPACT OF CLIMATE CHANGE REACHING THE STAGE OF EMERGENCY FOR INTERNATIONAL HUMAN RIGHTS LITIGATION?

Tímea Lazorčáková

Abstract

The European Green Deal is a commitment of climate neutrality by 2050. It sets specific obligations for states to achieve it. However, the actual implementation and their fulfilment can sometimes be difficult and slow. The need of climate neutrality is not only in the interest of the environment protection, but also due to protection of humanity itself and their fundamental rights, which are directly affected by climate change. The fulfilment of the states' obligations in climate neutrality could be achieved, among other things, through the decisions of the judicial authorities, which can cause direct pressure on the states, even more if they also concern a possible violation of fundamental rights, such as the right to life, health, or the right to private life. The aim of this contribution is therefore to connect the increasing level of protection of fundamental rights under the influence of the jurisprudence of judicial and quasi-judicial bodies and their impact on the fulfilment of the obligations of states in the field of climate neutrality. Its goal is also to evaluate their current status, possible impact and expected development in the future.[1]

Introduction

Climate change is one of the most urgent and serious threat to human life today. This issue has long been the subject of discussions as well as agreements between states. The Paris Agreement brought the first concrete measures to lower the Earth's temperature and mitigate climate change. In the conditions of the European Union, the European Green Deal was subsequently adopted, which establishes an accurate commitment to climate neutrality until 2050. The states are committed to fulfil it and to reflect the obligations resulting from it also at the national level. However, the need to address climate change

[1] The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)".

and its consequences also creates space for judicial authorities, which can assess, how individual states are fulfilling their obligations. Climate change has an impact on several areas of life and, considering current developments, it can be argued that it also affects basic rights themselves. It is through judicial and quasi-judicial bodies, which can solve new issues that arise because of climate change and interfere into fundamental rights. Deterioration of the environment can have a significant negative impact on several basic rights, such as the right to a favourable environment, the right to protect private and family life, and the right to life. Despite that, the exact obligations of the states in the field of fundamental rights in the interest of mitigating climate change and preventing its negative consequences are not clear. Therefore, the framework of this matter is mainly shaped by the jurisprudence of individual judicial and quasi-judicial bodies. It can be argued that climate litigation is becoming an important tool to address the accountability gaps left by the Paris Agreement and forcing the application of responsibility in the event of non-fulfilment of obligations to which states have committed themselves.[2]

3.1 The rise of Climate Litigation in Recent Years

In the last 6 years, climate cases have been spreading all over the world and reaching the transnational level. In addition, these are cases that are linked to fundamental rights. By 2015, there were only 5 such climate litigations linked to fundamental rights worldwide. Numbers of climate litigations increase in last decades. Different stages and different actions are connected to many legal regulations which can be affected or breached due to climate change. Such climate litigations are logically linked to fundamental rights because the negative impact on environment has often negative impact on people's lives as well. Climate change can interfere into the right to life, the right to private life, the right to own property, or the right to health protection. Fundamental rights judiciary bodies give us the unique way of environment protection through fundamental rights. They reflect the state of the environment, state´s impact and the consequences of the threat of fundamental rights due to climate change.

Quasi-judicial bodies such as the Human Rights Committee and the Committee on the Rights of the Child, as well as judicial bodies, especially

[2] LUPORINI, R. – A. KODIVERI: *The Increasing Role of Human Rights Bodies in Climate Litigation*. The British Academy, London, p. 13. Online: https://www.thebritishacademy.ac.uk/documents/3555/BA1084_COP26_Human_Rights_V2.pdf (quoted 1 July 2022).

the European Court of Human Rights, have a great influence on the creation of climate litigation within fundamental rights. An important milestone was also the adoption of the resolution by General Assembly of the United Nations in 2021, which pointed to the need of protection fundamental rights precisely in the context of climate change.[3]

However, before we look at the activities of these international judicial and quasi-judicial bodies, it is necessary to devote a few words to one national case, which represents an important milestone in the protection of the environment and the definition of state responsibility for non-fulfilment of obligations to mitigate climate change, precisely in the context of protection of fundamental rights. This is a national case of Urgenda pending in the Dutch courts.

The Urgenda case opened the door to climate litigation that highlights the risk of life and health violation. The argumentation of this case reached the European Convention on Human Rights, primarily on right of life (Article 2) and right of private life (Article 8) protection. Netherlands courts stressed that State has a legal duty of protection which must be provided to residents of the Netherlands based on Articles 2 and 8 ECHR in order to protect their right to life and their right to private and family life. It may therefore be ordered to comply with this duty by the courts unless there are grounds for an exception.[4]

The Dutch court relied on the jurisprudence of the European Court of Human Rights, which in this context points to the fact that states are obliged to take appropriate measures if there is a real and direct threat to the life or well-being of persons.[5] The revolutionary sign was that the Supreme Court of

[3] In order to emphasize the importance and timeliness of the problem, the institute of a special rapporteur for the promotion and protection of fundamental rights in the context of climate change was established for three years. At the same time, it called on all states to cooperate with it to fulfil its tasks and provide it with the necessary information. It emphasizes that, while taking steps to respond to climate change, States must ensure that they meet their human rights obligations. General Assembly, United Nations: Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change. Resolution adopted by the Human Rights Council on 8 October 2021, A/HRC/RES/48/14, Article 3 and 7. Online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/285/48/PDF/G2128548.pdf?OpenElement (quoted 1 July 2022).

[4] Judgment of Supreme Court of the Netherlands: *The State of the Netherlands and Stichting Urgenda*. Decision of 20 December 2019, p. 40. Online: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf (quoted 1 July 2022).

[5] *Ibid.*, p. 4.

the Netherlands formulated this requirement in the context of climate change, which represents a risk for the future and especially a long-term risk.[6]

For these reasons, the judgment of the Supreme Court of the Netherlands has an undeniable impact on current and future climate litigation. Court conclusions stating that climate change affects the right to life and right to private and family life; that the state in relation to both has rights and due diligence obligation to take preventative measures, in line with the precautionary principle, and that these obligations can be connected to the targets negotiated in relation to GHG emissions will be important points of reference for future litigation.[7]

At the same time, the Urgenda case opened the door for the climate litigation before the European Court of Human Rights, when it pointed out the direct link between the need to take measures to reduce greenhouse gas emissions and the protection of the right to life and private life. The protection of these is mainly guaranteed by the European Convention on Human Rights.

3.2 Committees Impact in Climate Litigation

In addition to the Urgenda case, the activity of international committees also has a huge impact on the development of the protection of fundamental rights due to climate change. During the last 2 years, the Human Rights Committee issued 2 important views in the context of the protection of fundamental rights under the climate change negative consequences and one was issued by the Committee for the Rights of the Child.

In the case of Ioane Teitiota vs. New Zealand (2020) Human Rights Committee addressed the issue of rising sea levels and its implications for low-lying islands and communities. The complainant referred to the protection of the right to life under Article 6 of the International Covenant on Civil and Political Rights, as well as the state's obligation not to deport a person if there is a real risk of irreparable damage to the right to life.

[6] Supreme Court of the Netherlands pointed out that fact in article 4.4., 4.6., 5.7.3., 7.4.3., and 8.3.4. of the decision.

[7] BURGERS, L. – A. NOLLKAEMPER: *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*. EJIL: Talk!, Blog of the European Journal of International Law, 6. January 2020. Online: https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/ (quoted 1 July 2022).

In January 2020, the Human Rights Committee accepted Teitiota's claims that rising sea levels would cause, that Kiribati will be uninhabitable in 10 to 15 years, but also noted that the state of Kiribati has plenty of time to take appropriate measures. Due to that, the decision to deport Teitiota was not illegal and New Zealand didn´t breach the conventions´ rights. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states.[8]

Another case still pending before the Human Rights Committee is Torres Strait Islanders v. Australia. Low-lying islanders are calling for declaration that Australia has failed to mitigate climate change and lower the temperature. These islands between Queensland and Papua New Guinea are already directly flooded. They are exposed to several negative consequences of climate change like sea level rise, storm surge, coral bleaching, and ocean acidification, which violated article 27 – the right to culture, article 17 – the right to be free from arbitrary interference with privacy, family and home, and article 6 – the right to life of the Convenant.[9] The conclusions of the Human Rights Committee in this matter can therefore be another important milestone, which will prove the direct negative consequence of non-fulfilment of obligations and non-solution of climate change by states.

The latest case currently pending before such an international quasi-judicial body is the submission of sixteen children against Argentina, Brazil, France, Germany, and Turkey. This case was dismissed for failure to exhaust domestic remedies, although it considered the real harm of children's health due to the worsening climate change. Besides that, it is significant because it defined the rules for the application of responsibility towards states in climate mitigation. The Committee for the Rights of the Child stated in 2021, that climate change and the subsequent environmental damage impact on human rights cause global collective issue that requires a global response, States parties still carry individual responsibility for their own acts or omissions in re-

[8] *Case Ioane Teitiota v. New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020, article 9.11. Online: https://www.refworld.org/cases,HRC,5e26f7134.html (quoted 1 July 2022).

[9] *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change*. Online: http://climate-casechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/ (quoted 1 July 2022).

lation to climate change and their contribution to it.[10] Which means, that we can´t sue several states due to non-binding obligations, if there is no causation between the breach of law by one state and health deterioration of persons in other states.

Despite the fact that these proceedings and their results represent non-binding opinions, the fulfilment of which depends on the will of the states, they represent an important element in the creation of climate litigation. The opinions of the committees can be very decisive for the future decision-making activity of the European Court of Human Rights.

3.3 Climate litigation before the European Court of Human Rights

Perhaps the most important role in European conditions, in human rights protection as a result of climate change, can provide the European Court of Human Rights. Although the European Convention on Human Rights does not include the right to healthy environment in its articles, the European Court of Human Rights has already decided about 300 cases related to the environment (related to noise or pollution), which had a significant impact on changes in the policy and practice of states. In these decisions, it required states to provide due diligence to prevent a serious and/or imminent risk of direct environmental damage, but it has not yet adjudicated about the consequences of climate change.[11] Currently, European Court of Human Rights has the opportunity to deal with cases directly related to climate change and its negative consequences, and thus create the possibility to impose specific positive obligations of the states in these matters.

Climate litigation based on fundamental rights arguments faces several challenges, including establishing a causal link between government inaction on climate change and the impact of inaction on human rights. Europe-

[10] United Nations, Committee on the Rights of the Child, *Decision of 8 October 2021*, CRC/C/88/D/104/2019, Article 10.8. Online: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20211008_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_decision-4.pdf (quoted 1 July 2022).

[11] VIGNE, S.: *All eyes turn to the European Court of Human Rights to assess future of rights-based climate litigation*. UNIVERSAL RIGHTS GROUP GENEVA, 1 February 2022. Online: https://www.universal-rights.org/blog/all-eyes-turn-to-the-european-court-of-human-rights-to-assess-future-of-rights-based-climate-litigation/ (quoted 1 July 2022).

an Convention on Human Rights doesn´t contain the obligation of the state to act and protect its citizens from the risks of climate change. It also does not contain the right to protect the environment, and the risks of climate change are very general and cannot therefore be attributed to the responsibility of the state. The European Court of Human Rights has proven such causal connection in several cases. For example, in the case of Budayeva against Russia, when 8 people died due to a mudslide in the Caucasus region. In this case, Russia did not cause the mudslide, but it did not take any action within its jurisdiction to prevent this tragedy, which fulfils the requirement of a causal link between the state's inaction and the consequence, which in this case is the death of several people.[12]

Current climate cases are very specific. They are very vague, not specific to a company, activity, or area. They are often based on arguments of the environment protection for future generations, and therefore the negative consequences of climate change are not yet entirely realistic. In some cases, it is already possible to speak directly about the damage to health due to damaged environment. However, several cases are filed by the complainants on behalf of future generations, for their health or environment protection, but these are based only on a high level of risk of health harm. Proving causation in these cases will therefore be really challenging, but in my opinion not unrealistic. The protection of fundamental rights under the European Convention on Human Rights should be practical and effective and not theoretical and unrealistic. Climate change is hard to feel in some cases, but it is becoming more real and more extensive every day. This must also be reflected in cases of potential threats to fundamental rights, especially if we are talking about the risk that arises in relation to many persons in several states. At the same time, the reality of the risk of many persons does not exclude the possibility that they are also directly affected by this risk individually. Several people are already directly affected by the consequences of climate change, floods, extreme heat, and related fires.

The European Court of Human Rights is aware of the urgency and seriousness of the problem and, as can be seen from the initial stages of the proceedings, is open to solving these cases. It emphasized the seriousness of the

[12] See more: *Case of Budayeva and Others v. Russia*. Judgment of European Court of Human Rights. Application num.: 15339/02, 21166/02, 20058/02, 11673/02 and 15343/0, 29 September 2008. Online: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-85436%22]} (quoted 1 July 2022).

matter and pointed out the need for fast proceedings, when granted priority status to them and set a relatively early deadline for the state's replies.

The first climate case in the context of fundamental rights violations before the European Court of Human Rights is the case of Agostinho and others against Portugal. In this case, 6 young Portuguese people filed a complaint against 33 states for not taking action on climate change and failing to meet the goals of the Paris Agreement. They are calling for more ambitious measures to be imposed. They file their complaint based on the violation of the right to life in accordance with Article 2, the right to private life in accordance with Article 8 and the prohibition of discrimination in accordance with Article 14 of the European Convention on Human Rights. They pointed to the fact that their lives are at a risk due to large-scale forest fires, and that their private life is greatly threatened because of the high temperatures. The surprising fact in this case is that the European Court of Human Rights called on the states to reply also to the possibility of the violation of the law regarding the prohibition of torture and inhuman and degrading treatment, as well as the right to own property.[13]

The second case was filed by the Union of Swiss Senior Women against Switzerland, where they pointed to Switzerland's inadequate climate policy, which violates women's right to life and health according to Articles 2 and 8 of the European Convention on Human Rights. In this case, national remedies were exhausted, but unsuccessfully. They mainly pointed to the fact that as a result of climate change and high temperatures, they suffer from various diseases and therefore feel that their basic rights are directly affected.[14]

These cases before the European Court of Human Rights are still pending, but it is already clear that they are key and seem to have the potential to be ground-breaking in the context of climate litigation.

Nevertheless, for the success of the dispute, it is necessary to resolve, among other things, the risk of failure to meet the procedural conditions of admissibility, and thus failure to meet the requirement of exhaustion of na-

[13] HERI, C.: *The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?* EJIL: Talk!, Blog of the European Journal of International Law, 22 December 2020. Online: https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/ (quoted 1 July 2022).

[14] HOLZHAUSEN, A.: *Senior Women for Climate Protection v Switzerland: A Chance for the European Court of Human Rights To Make History in Climate Litigation*. In: Cambridge International Law Journal, 24 December 2020. Online: http://cilj.co.uk/2020/12/24/senior-women-for-climate-protection-v-switzerland-a-chance-for-the-european-court-of-human-rights-to-make-history-in-climate-litigation/ (quoted 1 July 2022).

tional remedies and failure to meet the requirement of the victim of a fundamental rights violation.

With regard to the request of the victim of a fundamental rights violation, it will probably be necessary to prove that the complainant's rights are directly affected. Proceedings before the European Court of Human Rights cannot be based on public interest, but it will be necessary to demonstrate that the complainant's rights are affected in some way due to state inaction. In relation to climate litigation, it is more difficult, because negative consequences of climate change are still developing and may only manifest themselves in the future. Despite this, there are already cases where people's quality of life is worsening due to climate change, and there is a presumption that it will be worse, for example, in connection with morbidity. That´s why, it seems to me, it will be possible to consider the state's inaction as a human rights violation on the individual base in the future.

Regarding the exhaustion of domestic remedies, it can be stated that in the first case a group of young Portuguese filed a complaint, without exhausting them, with the argument that the complaint is against several states and their exhaustion is impossible. According to available information, it seems that the European Court of Human Rights at least accepts such a complaint for further proceedings, but there is still the possibility of its rejection precisely because of the failure to fulfill these procedural admissibility criteria. If the European Court of Human Rights allowed an exception in all such cases, it would require a strong argument why it did so. Otherwise it can create a dangerous precedent for further proceedings. Therefore, even in these cases, the European Court of Human Rights will probably approach the individual assessment of the possibility of using domestic remedies, and assess the non-fulfillment of this criteria. On the other hand, even if such a complaint is rejected due to failure to meet all the conditions of admissibility, the expression of a legal opinion in the decision itself is not excluded. The European Court of Human Rights can come to a certain opinion and point out the need to act by individual states. But there we can see the problem of enforceability. Only the statement with complaint inadmissibility is not legally enforceable and the states will not accept it. It will be just another text in black and white about what states should be doing, but they are not.

Taking into account the current level of climate change and its impact on people's lives, it is already possible to state that there is a tangible basis for the application of requirements for states to fulfill their obligations, precisely through the jurisprudence of judicial authorities. This is also why I think

that, taking into account the urgency and seriousness of the matter, the European Court of Human Rights will not reject such cases due to non-fulfillment of procedural admissibility criteria. Hopefully, it will take a realistic opinion, that it is possible to proceed with real reclaim and subsequent fulfillment of the obligations to which the states have committed themselves. Without the shortcomings related to the fulfillment of admissibility criteria, a unique opportunity would be created for the European Court of Human Rights to establish specific positive obligations of states in the interest of climate change mitigation and preventing its negative consequences on fundamental rights. However, it will be up to his own assessment, what it will give priority to in these cases and whether it will come to the conclusion that such procedures of the state do not only represent a potential threat, but real and direct fundamental rights violation, which must also be resolved through such climate litigation.[15]

Conclusion

There is no doubt about the necessity of environmental climate litigation these days. Putting the states before the court creates a great opportunity of law enforcement. Especially, in context of fundamental rights and environment. In my opinion, this type of climate litigation is the only effective way, how to change the approach of states in fulfilling their commitments. At the same time, the growing number of climate cases at the regional and national level, which are at least currently the subject of assessment and are a prerequisite for judiciary, contributes to the binding obligations in environmental law, and also leads to pressure on states to fulfill their obligations to which have committed themselves and take the necessary measures. All in the context of a direct threat to fundamental rights. Fundamental rights create in this way an appropriate base for admitting more ambitious regulations and commitments for climate change mitigation in time or in the future. Even if judicial bodies challenge numerous obstacles, it is still possible to create revolutionary judiciary which is necessary these days.

[15] LUPORINI, R. – A. KODIVERI: *The Increasing Role of Human Rights Bodies in Climate Litigation*. The British Academy, London, p. 11. Online: https://www.thebritishacademy.ac.uk/documents/3555/BA1084_COP26_Human_Rights_V2.pdf (quoted 1 July 2022).

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4.) LUPORINI, R. – A. KODIVERI: *The Increasing Role of Human Rights Bodies in Climate Litigation*. The British Academy, London. Online: https://www.thebritishacademy.ac.uk/documents/3555/BA1084_COP26_Human_Rights_V2.pdf (quoted 1 July 2022).

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6.) *Case Ioane Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020. Online: https://www.refworld.org/cases,HRC,5e26f7134.html (quoted 1 July 2022).

7.) Judgment of Supreme Court of the Netherlands: *The State of the Netherlands and Stichting Urgenda.* Decision of 20 December 2019, Online: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf (quoted 1 July 2022).

8.) *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change.* Online: http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/ (quoted 1 July 2022).

9.) *Resolution adopted by the Human Rights Council on 8 October 2021*, A/HRC/RES/48/14. Online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/285/48/PDF/G2128548.pdf?OpenElement (quoted 1 July 2022).

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11.) *International Covenant on Civil and Political Rights*. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Online: https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/ccpr.pdf (quoted 1 July 2022).

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4 GREEN POLICY COORDINATION: COMPETITION POLICY'S POTENTIAL FOR SUPPORTING SUSTAINABLE DEVELOPMENT

Teresa Oriani

Abstract

At first glance, competition policy has very little to do with the environment. However, competition policy and environmental protection can interact and mutually affect each other. Moreover, the link between competition policy and environmental protection has gained importance with the increasing recognition of sustainable development as an overarching policy goal. Against this background, the present paper explores the following question: concretely, how do competition authorities manage the interplay between competition law and environmental protection in a way that is conductive to sustainable development? The paper proposes to look at this challenge through the lens of policy coordination, understood as the activity of bringing disparate policies together to produce synergies between them and improve policymaking. Drawing from policy coordination literature and with the help of three case studies, the paper argues that a policy coordination perspective can illuminate fundamental aspects of the interaction between competition policy and the environment.

Introduction

At first glance, the relationship between competition law and environmental protection is all but granted. One may even think that the two have very little, if nothing, to do with each other. Indeed, competition policy cannot be the main driver of environmental protection: competition policy's main task is to safeguard consumer welfare and ensure the smooth functioning of the market mechanism, not to protect natural resources from depletion or to curb climate change.[1] That is the task of environmental policy.

[1] The goals of EU competition law are a long-debated topic. See, for example, EZRACHI, A.: *The Goals of EU Competition Law and the Digital Economy*, Brussels: BEUC, 2018. Online: https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf (quoted 1 July 2022); NAZZINI, R.: *The Foundations of European Union Competition Law: The Objective and Principles of Article* 102, 1st edition,

In spite of this difference in goals and objects, competition law and environmental protection are not as far apart from each other as one might expect, and indeed they often interact. On the one hand, the application of environmental policy can affect market competition. For example, under the EU Emission Trading System (ETS) a company that emits great quantities of CO_2 will have to purchase a higher quantity of emission allowances. The extra expenditure incurred for the purchases will increase the company's costs and might, as a result, affect the company's competitive position in the relevant market. On the other hand, the application (or non-application) of competition law can sometimes have an effect on environmental protection. This is the case, for example, when an agreement between firms pursuing an environmental aim is found to restrict competition. This may also be the case when a merger between undertakings, which restricts competition and carries efficiencies outweighing the competitive restriction, at the same increases CO_2 emissions. Competition policy and environmental policy thus are not sealed clusters from one another: rather, areas of overlap and mutual influence exist between them.

These areas of interaction between competition policy and environmental policy must be managed with a view to achieving sustainable development,[2] which has been adopted as an overarching policy goal in the European Union.[3] Article 3(3) TEU, which states that "The Union […] shall work for the sustainable development of Europe", consecrates sustainable development as one of the core objectives of the EU. In addition, the EU is committed to implementing the United Nation's 2030 Agenda for Sustainable Development.[4]

Oxford: Oxford University Press, 2011, 435 p., ISBN: 9780191730856; TOWNLEY, C: *Article 81 EC and Public Policy*, 1st edition, Oxford and Portland, Oregon: Hart, 2009, 363 p., ISBN: 9781841139685; MONTI, G.: *EC Competition Law*, 1st edition, Cambridge: Cambridge University Press, 1st edition, Cambridge: Cambridge University Press, 2007, 527 p., ISBN: 9780521700757; ODUDU, O.: *The Boundaries of EC Competition Law: The Scope of Article 81*, 1st edition, Oxford and New York: Oxford University Press, 2006, 228 p., ISBN: 9780199278169; GERBER, D. J.: *Law and Competition in Twentieth Century Europe: Protecting* Prometheus, 1st edition, Oxford: Oxford University Press, 2001, 472 p., ISBN: 9780191705182; AMATO, G.: *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*, 1st edition, Oxford: Hart Publishing, 1997, 147 p., ISBN: 9781901362299.

[2] See Article 3 TEU; Article 11 TFEU.

[3] See Article 3 TEU; UN General Assembly: *Transforming our world: the 2030 Agenda for Sustainable Development,* resolution A/RES/70/1, 21 October 2015. Online: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (quoted 1 July 2022).

[4] See *Ibid.*; see also COMMISSION: *Delivering on the UN's Sustainable Development Goals*. Staff Working Document, SWD (2020) final, p. 2.

The Agenda is not legally binding; however, it provides policy directions and is currently an intrinsic part of President Von der Leyen's political guidelines.[5] In the context of sustainable development, environmental protection, and in particular climate change, are an objective as well as a current policy priority of the EU. Among the core objectives of the EU, Article 3(3) TEU lists "a high level of protection and improvement of the quality of the environment". Article 11 TFEU, moreover, requires that "Environmental protection requirements […] be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development." Finally, with the presentation of the European Green Deal by the Commission in 2019, and even more importantly with the adoption of the Climate Law by the European Parliament and by the Council of the European Union in 2021, the EU has made the reduction of carbon emissions from its economy not only a top policy priority, but also a legal requirement.[6]

In sum, competition policy interacts with environmental policy; moreover, legislative and policy instruments at the EU and international level require institutions to pursue sustainable development. A question then arises: concretely, how do competition authorities manage the interplay between competition law and environmental protection in a way that is conductive to sustainable development?

The rest of this paper, articulated in 3 Sections and one Conclusion, proposes to look at this interaction through the lens of policy coordination studies. The paper argues that the policy coordination perspective can provide meaningful insights for answering the questions raised by situations where competition policy and environmental policy interact. Section 2 defines the concept of policy coordination. Section 3 and 4 illustrate the relevance of the concept of policy coordination for the relationship between competition policy and environmental policy: respectively. Section 3 maps the variety of coordination problems that can arise between competition policy and environmental policy. Section 4, then, analyses the different impacts that coordi-

[5] See COMMISSION: *EU holistic approach to sustainable development*. Online: https://ec.europa.eu/info/strategy/international-strategies/sustainable-development-goals/eu-holistic-approach-sustainable-development_en (quoted 1 July 2022).

[6] See COMMISSION: *The European Green Deal (Communication)*, COM(2019)640 final; *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')* OJ L 243 1.

nation efforts can have on competition policy. Finally, Section 5 looks at the relationship between policy coordination and Article 11 TFEU and argues that relevant factors for coordination include, but also go beyond, the legal context.

4.1 The Problem of Policy Coordination

In public organizations, a dynamic relationship exists between coordination and specialisation.[7] The essence of the relationship is one of balancing and trade-off. Specialisation ensures that an organisation – or an individual within an organisation – performs a task as well as possible by assigning clear missions and developing and concentrating expertise.[8] An expression of this principle can be found in the Tinbergen Rule, named after the economist and Nobel laureate Jan Tinbergen. According to the Tinbergen Rule, if policies are to be effective, the number of independent policy objectives cannot exceed the number of policy instruments.[9] In other words, every policy instrument must be specifically designed to achieve only one policy objective. However, policy problems, policy objectives and policy instruments are seldom independent from one another: rather, policy instruments interact and influence each other. Moreover, policy instruments, even if they are designed to serve only one policy goal, can affect more than one policy goal at a time.[10] Policy goals themselves, finally, are not always independent from one another, but can interact.

Because policy objectives and policy instruments are interdependent, *coordination* between different policies is needed in order to appraise problems and solutions more holistically and to allow for a more unitary mode of governing.[11] However, maximising both coordination and specialisation at the same time may not be possible, as trade-offs may arise between the two. Spe-

[7] PETERS, B. G.: *Pursuing Horizontal Management: The Politics of Public Sector Coordination*, 1st edition, Lawrence, Texas: University Press of Kansas, 2015, p. ix, ISBN: 978-0-7006-2093-7; CHRISTENSEN, T., LÆGREID, P.: *The Challenge of Coordination in Central Government Organizations: The Norwegian Case*. In: Public Organization Review, Vol. 8, No. 2, 2008, p. 101, ISSN: 1566-7170.

[8] PETERS (note 7), p. ix.

[9] See for example SCHAEFFER, P.V.: *A Note on the Tinbergen Rule*, 4 April 2019, p. 3. Online: https://www.petervschaeffer.com/uploads/7/4/3/3/74334295/a_note_on_the_relevance_of_tinbergen.pdf (quoted 1 July 2022).

[10] See SCHAEFFER (note 9), p. 6–10, 11–12.

[11] See PETERS (note 7), p. 5.

cialisation, in fact, can hinder coordination because it can promote a segmented vision of policy, which impedes a more integrated understanding of the causes and possible remedies of policy problems.[12] Given their respective benefits and drawbacks, "governments need to balance the competing virtues of specialization and coordination".[13]

4.1.1 Complex Problems and New Public Management: The Increased Importance of Policy Coordination

Problems of coordination between policies have gained increasing attention from scholars and policymakers in recent decades, as the tension between specialisation and coordination became increasingly apparent in government practice. The first factor contributing to the increased importance of policy coordination was the recognition of the existence of complex policy problems. Complex policy problems are also called "wicked problems", a term coined by Rittel and Webber in an article from 1973. According to Rittel and Webber, wicked problems, which comprise "nearly all public policy issues", are "inherently different from the problems that scientists and perhaps some classes of engineers deal with", because they do not define a clear mission and it is not clear when they have been solved,[14] and as a consequence they cannot be solved through the deployment of sectoral professional expertise.[15]

The notions of wicked problems and complex problems have been used to refer to policy problems that span across a multitude of policy areas and that do not fall neatly within any one policy sector.[16] Unlike "tame problems",[17] which can easily be analysed through sectoral knowledge and solved through sectoral policy instruments, wicked problems challenge the boundaries of

[12] *Ibid.,* p. ix.

[13] *Ibid.,* p. 1.

[14] RITTEL, H. W. J., WEBBER, M. M.: *Dilemmas in a General Theory of Planning*. In: *Policy Sciences*., Vol. 4, No. 2, p. 160, ISSN: 1573-0891.

[15] *Ibid.,* p. 160–161.

[16] See for example CEJUDO, G. M., MICHEL, C. L.: *Addressing fragmented government action: coordination, coherence, and integration*. In: Policy Sciences, Vol. 50, No. 4, 2017, p. 745–767, ISSN: 0032-2687; JORDAN, A., SCHOUT, A.: *The Coordination of the European Union: Exploring the Capacities of Networked Governance*, 1st edition, Oxford: Oxford University Press, 2006, p. 4, ISBN 978-0-19-928695-9; BRIASSOULIS, H.: *Policy Integration for Complex Policy Problems: What, Why and How*. Conference paper: Berlin Conference on the Human Dimensions of Global Environmental Change: Greening of Policies – Interlinkages and Policy Integration, 2004, p. 14. Online: http://userpage.fu-berlin.de/ffu/akumwelt/bc2004/download/briassoulis_f.pdf (quoted 1 July 2022).

[17] See RITTEL, WEBBER (note 14), p. 160.

policy sectors. For this reason, they cannot be solved by the action of an individual sectoral policy but must be tackled from multiple perspectives.[18] In particular, climate change and sustainable development are complex problems. As such, they require "the involvement of much of government, and hence coordination."[19]

Developments in the study and practice of public administration have also contributed to increase the attention dedicated to coordination. In the 1980s, a movement developed in administration studies: the New Public Management (NPM) school. NPM integrated "the principles of the private sector and business administration into the field of public administration"[20] – principles such as entrepreneurship, privatisation, customer orientation, and private sector management techniques.[21] At the same time, NPM reviewed the role of government: while retaining "the capacity to frame policies", government would be "largely removed from the day-to-day concern with implementation",[22] so that decisions would be deconcentrated and power decentralised.[23] The aim of the changes was to increase efficiency and transparency in public administration.[24]

The adoption of NPM principles in several countries resulted in a move towards specialisation,[25] in particular through the adoption of single-purpose agencies and performance management.[26] Starting in the 90s, however, NPM theories became the object of some critique. Among the grounds for critique, one is particularly important for the present paper: specialisation

[18] PETERS, B. G.: *The challenge of policy coordination*. In: Policy Design and Practice, Vol. 1, No. 1, 2018, p. 2, ISSN: 2574-1292.; CEJUDO, MICHEL (note 16), p. 2.

[19] PETERS (note 18), p. 2; see also BRIASSOULIS (note 16), p. 12: "PI is needed to hold the policy system together, to overcome its tendencies towards disorder, and to manage the numerous policy interconnections so that policy supply meets policy demand, supporting the effective resolution of complex problems and the transition to sustainable development."

[20] ÇOLAK, Ç. D.: *Why the New Public Management is Obsolete: An Analysis in the Context of the Post-New Public Management*. In: Croatian and Comparative Public Administration, Vol. 19, No. 4, 2019, p. 517–536. Online: https://heinonline.org/HOL/LandingPage?handle=hein.journals/hkju19&div=28&id=&page= (quoted 1 July 2022).

[21] *Ibid.,* p. 519.

[22] PETERS, B. G., *The Search for Coordination and Coherence in Public Policy: Return to the Center*, 2004, p. 2. Online: http://userpage.fu-berlin.de/ffu/akumwelt/bc2004/download/peters_f.pdf (quoted 1 July 2022).

[23] *Ibid.*, p. 1.

[24] CHRISTENSEN ET LÆGREID (note 7), p. 98.

[25] *Ibid.*

[26] PETERS (note 7), p. 8.

was perceived as diminishing the level of coordination and policy integration in the government and as causing fragmentation.[27] Together with the increased awareness about the specificity of complex problems, the critical appraisal of NPM was at the roots of an increase in attention for issues of policy coherence, coordination and integration.

4.1.2 Coordination Defined

When we talk about coordination, we talk about how to "bring […] disparate policies together to produce more effective policies and services".[28] Beyond this common core, however, the various wordings employed in the literature to refer to the endeavour of bringing policies together differ greatly, leading to a plethora[29] of terms that only partially overlap with each other. The most commonly employed terms are policy coordination and policy integration.[30] The term policy integration is often employed to refer to the consideration of environmental elements in sectoral policies: in the environmental context, the concept is known as Environmental Policy Integration, abbreviated EPI.[31] In parallel, and often in the same context, the term policy integration is also used to refer to a particularly strong form of coordination, involving the harmonisation of policy goals or the identification of comprehensive policy goals.[32]

[27] See PETERS (note 22), p. 4.

[28] PETERS, B. G., Public Policies: *Coordination, Integration, Coherence, and Collaboration*. In: Oxford Research Encyclopedia of Politics, Oxford University Press, 2021, p. 2, ISBN 978-0-19-022863-7. Online: https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-164 (quoted 1 July 2022).

[29] See TOSUN, J., LANG, A.: *Policy integration: mapping the different concepts*. In: Policy Studies, Vol. 38, No. 6, 2017, p. 554, ISSN: 1470-1006.

[30] For a literature review concerning the various definitions of policy integration, see for example BRIASSOULIS, H.: *Policy Integration for Complex Environmental Problems: The Example of Mediterranean Desertification*, 1st edition, London: Routledge, 2005, Chapter 1, 388 p., ISBN 978-1-138-25903-4; PERSSON, Å.: *Environmental Policy Integration: An Introduction*. Stockholm: Stockholm Environment Institute, 2004, 49 p. Online: https://mediamanager.sei.org/documents/Publications/Policy-institutions/pints_intro.pdf (quoted 1 July 2022).

[31] See TREIN, P., MEYER, I., MAGGETTI, M.: *The Integration and Coordination of Public Policies: A Systematic Comparative Review*. In: Journal of Comparative Policy Analysis: Research and Practice, Vol. 21, No. 4, 2019, p. 332–333, ISSN: 1387-6988.

[32] See for example CEJUDO ET MICHEL (note 16); PETERS (note 7), p. 4.

In addition to the terms coordination and integration, a number of other terms have been used in the literature, such as policy coherence,[33] joined-up government, whole of government, policy mainstreaming, collaboration, comprehensive planning, horizontal governance, holistic government, holistic governance, functional regulatory spaces, and boundary spanning policy regimes.[34] In this paper, I choose to use the expression "policy coordination" rather than "policy integration", "policy coherence" or any other term.[35] I do not use the expression "policy coordination" to refer to one particular level or strategy of coordination, but rather to refer to the general action of achieving synergies between policies.[36] I use the word "coordination", rather than "integration", for two reasons: first, to distinguish the "policy coordination" approach to the relationship between environmental issues and competition law from a more strictly legal approach to the same issue.[37] Second, I do not assume any particular level or instrument of coordination to be at play. Rather, I consider coordination to be a broad umbrella term that can accommodate a multiplicity of levels and instruments, from the loosest to the tightest, from hierarchy-based coordination to the circulation of policy ideas through collaboration and informal networks of actors.[38] Such a broad understanding of the term coordination allows to draw from literature employing all the above-mentioned terms in order to build a framework for analysing the relationship between competition law and environmental protection.

The conceptual unity that the expression "coordination" provides, however, must not lead to disregard the fact that coordination takes a variety of

[33] The term "policy coherence" is often used in the context of the implementation of UN Sustainable Development Goals. See for example OECD: *Recommendation of the Council on Policy Coherence for Sustainable Development*, OECD/LEGAL/0381, 2019 (amended version). Online: https://www.oecd.org/gov/pcsd/recommendation-on-policy-coherence-for-sustainable-development-eng.pdf (quoted 1 July 2022).

[34] Most of these terms figure in TOSUN and LANG's literature review (note 29); "collaboration" figures in PETERS (note 7), p. 6; "policy coherence" as distinguished from policy coordination and policy integration figures, for example, in CEJUDO, MICHEL (note 16). For an overview of the various terms and their different meanings, see PETERS (note 7) Chapter 1.

[35] However, see PERSSON's critique: "How relevant are Peter's arguments to EPI? […] it could be questioned whether ‚coordination' really implies the same decision-making requirements as 'integration', or if it should be seen as a first step towards integration" (note 30, p. 12).

[36] See PETERS (note 22), p. 4.

[37] See for example NOWAG, J.: *Environmental Integration in Competition and Free-Movement Laws*, 1st edition, Oxford: Oxford University Press, 2017, ISBN 978-01-9181-544-7.

[38] See PETERS (note 28).

forms and depths and that it can be viewed from a multiplicity of perspectives. Particularly important for this study is the distinction between different strengths, or levels, of coordination between policies. One can imagine the spectrum of coordination strength as a continuum going from the total independence of two (or more) policy areas all the way to the creation of new policy instruments and goals to which the previously autonomous policies are bound. Total independence corresponds to the minimum degree of coordination, while a new policy encompassing the previously distinct policies corresponds to the maximum degree of coordination. Different studies distinguish different degrees on this continuum.[39] For example, Peters distinguishes "four possible levels of coordination, each involving greater integration of policy and therefore representing a greater investment of political capital".[40] The first level, negative coordination, requires to reduce "negative interactions"[41] between policies; the second level, positive coordination, requires organisations with independent goals to coordinate and work together;[42] the third level, policy integration, requires coordinating policy goals to ensure their compatibility;[43] finally, the fourth level consists in developing strategies and requires organisations to agree on general goals and to develop "a vision for the future of policy and government, and for the future of the policy areas involved".[44] With respect to this last level of coordination, one goal around which strategic approaches to government can be brought about is sustainable development.[45]

[39] See for example PETERS (note 7), p. 3–4; METCALFE, L.: *International Policy Co-ordination and Public Management Reform*. In: International Review of Administrative Sciences, Vol. 60, 1994, p. 271–290. Online: https://journals.sagepub.com/doi/10.1177/002085239406000208 (quoted 1 July 2022); CEJUDO, MICHEL (note 16); see also, for a definition of policy integration, UNDERDAL, A.: *Integrated marine policy*. In: Marine Policy, Vol. 4, No. 3, 1980, p. 159–169, ISSN: 0308-597X.

[40] PETERS (note 22), p. 5.

[41] *Ibid.*

[42] *Ibid.,* p. 5–6.

[43] *Ibid.,* p. 6.

[44] *Ibid.*

[45] *Ibid.,* p. 6–7, "Sustainable development […] involves moving toward a articulated strategy for achieving other goals (especially economic goals) while at the same time maintaining the commitment to a sustainable developmental future."

4.2 Synergies, Conflicts, Redundancies and Gaps: Interactions in Competition Policy and Environmental Policy

Taking a policy coordination view can help paint a comprehensive picture of the relationship between competition policy and environmental policy by identifying the various dynamics that can arise between them. The ongoing discussion about greening competition law mainly focuses on Article 101 TFEU, and in particular on its paragraph 3, which provides an exemption from the prohibition of anticompetitive agreements. Two issues have been the object of special attention: whether sustainability benefits can be considered as relevant benefits under the first condition of Article 101(3) TFEU; and whether consumers in the relevant market can be less than fully compensated if benefits for society as a whole result from the agreement.[46] Albeit to a lesser extent, the discussion also focuses on merger control,[47] while it deals only marginally with Article 102.[48] The relationship between competition policy and environmental policy, however, can also present different dynamics than those highlighted in the current debate. In fact, the interplay between competition policy and environmental policy can give rise to synergies as well as to various coordination problems, namely conflicts, redundancies and gaps.[49]

[46] The four conditions for exempting an agreement under Article 101(3) TFEU are the following: (1) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (2) the agreement must allow consumers a fair share of the resulting benefits; (3) the restrictions must be essential to achieving the agreement's objectives; (4) the agreement must not give the parties the possibility of eliminating competition.

[47] See for example ROSENBOOM, N., JOHNSON, M.: *The role of sustainability in merger control*. Oxera Agenda, 16 April 2021. Online: https://www.oxera.com/insights/agenda/articles/the-role-of-sustainability-in-merger-control/ (quoted 1 July 2022); DOLMANS, M.: *Sustainable Competition Policy*. In: SSRN Electronic Journal, 2020, ISSN: 1556-5068. Online: https://www.ssrn.com/abstract=3608023 (quoted 1 July 2022); HOLMES, S.: *Climate change, sustainability, and competition law*. In: Journal of Antitrust Enforcement, Vol. 8, No. 2, 2020, p. 354–405, ISSN: 2050-0688.

[48] See for example IACOVIDES, M.C., VRETTOS, C.: F*alling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice*. In: Journal of Antitrust Enforcement, Vol. 10, No. 1, 2022, p. 32–62, ISSN: 2050-0688; HOLMES (note 47).

[49] PETERS (note 7), p. ix, 20-21.; see also CANDEL, J. J. L., BIESBROEK, R.: *Toward a processual understanding of policy integration*. In: Policy Sciences, Vol. 49, No. 3, p. 226, 2016, ISSN: 0032-2687; BRIASSOULIS (note 16), p. 13.

4.2.1 Synergies

Competition policy and environmental policy can work in synergy in a number of occasions. For example, as was mentioned above, competition policy can incentivise green innovation and encourage an efficient use of natural resources. A concrete example of an instance where competition policy and environmental policy worked in synergy was the *AdBlue* case.

The facts of the *AdBlue* case are the following: BMW, Daimler, Volkswagen, Audi and Porsche had entered into a cooperation agreement for developing technology to reduce harmful NOx emissions in diesel cars. The cooperation agreement involved regular technical meetings of the four producers. The technical cooperation was, in itself, legitimate, but the car manufacturers did not stop at technical meetings: they also reached a common understanding about how effective their use of the cleaning technology would be. The car manufacturers were aware that the full display of the cleaning technology allowed to clean emissions beyond legal requirements, and they signalled to each other that they would not aim to over-comply.[50] The Commission investigated the conduct and found that it constituted an infringement by object of Article 101 TFEU.

In the *AdBlue* case, the implementation of competition policy produced synergies with environmental policy, as it removed an obstacle to reaching lower-than-mandated levels of NOx emissions.[51] More in general, competition enforcement against anticompetitive conducts amounting to greenwashing, as well as against cartels disguised as environmentally friendly

[50] See COMMISSION: *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars.* Press Release, 8 July 2021. Online: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581 (quoted 1 July 2022); VESTAGER, M.: *Statement by Executive Vice-President Vestager on the Commission decision to fine car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars*, 8 July 2021. Online: https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3583 (quoted 1 July 2022).

[51] The need to provide incentives to reach higher levels of environmental protection than mandated by regulation is a relevant issue in environmental regulation. It is one of the reasons why market-based regulatory instruments and voluntary instruments were developed alongside command-and-control instruments. See KINGSTON, S., HEYVAERT, V., ČAVOŠKI, A.: *European Environmental Law*, 1st edition, New York: Cambridge University Press, 2017, 558 p., ISBN 978-1-107-01470-1; KINGSTON, S.: *Greening EU Competition Law and Policy*, 1st edition, Cambridge: Cambridge University Press, 2011, 474 p., ISBN 9780511758522; see also SCOTT, J.: *EC Environmental Law*, 1st edition, New York: Longman, 1998, p. 36, ISBN 9780582291904.

initiatives, helps advance environmental policy objectives. In other words, *synergies* exist between competition policy and environmental policy.

4.2.2 Conflicts

A conflict is "an active disagreement between people with opposing opinions or principles".[52] The verb "to conflict" refers to a situation when "beliefs, needs, or facts, etc. […] are very different and cannot easily exist together or both be true".[53] In the context of policies, then, a conflict can be taken to mean that two policy instruments are in opposition with one another, so that one runs counter the other and diminishes the other's effectiveness.

When it comes to competition policy and environmental policy, conflicts are the most commonly discussed example of coordination problems. The ongoing argument in favour of "greening" Article 101 TFEU is premised on the existence of conflicts between, on the one hand, environmental policy instruments in the form of environmental agreements, and on the other hand competition policy. Such conflicts consist in the fact that the application of competition policy impedes the conclusion of agreements for environmental purposes and thus jeopardises the achievement of the environmental objectives pursued by the agreements. At the same time, the environmental agreements restrict competition, potentially frustrating the objective of competition policy.

It is possible to illustrate how a conflict between competition policy and environmental policy can arise and be successfully solved through the example of the *DSD* case,[54] which arose from the establishment of a waste management and recycling system pursuant to national law. In 1991, Germany issued the Packaging Ordinance,[55] a piece of legislation designed to prevent or reduce the impact of packaging waste on the environment.[56] The Ordinance required packaging manufacturers and distributors to ensure the collection of waste packaging materials from final consumers.[57] Manufacturers and distributors could discharge the obligation either by performing the col-

[52] Cambridge Dictionary Online. Online: https://dictionary.cambridge.org/it/dizionario/inglese/conflict (quoted 1 July 2022).
[53] *Ibid.*
[54] DSD (Case COMP/34493) Commission Decision 2001/837/EC [2001] OJ L 319/1.
[55] *Ibid.,* para. 11.
[56] *Ibid.*
[57] *Ibid.,* para. 14.

lection autonomously or by participating in an extensive system for the collection and recovery of sales packaging.[58]

Der Grune Punkt – Duales System Deutschald AG, abbreviated DSD, is an enterprise organising a nation-wide extensive waste collection system for household packaging waste and, at the time, it was the only company operating an extensive waste collection system within the meaning of the Packaging Ordinance.[59] DSD's share in the market for the collection and sorting of household packaging waste was 80%.[60] In order to fulfil the obligations arising out of the Packaging Ordinance, DSD did not perform the collection itself, but concluded contracts with waste collection companies.[61] The Service Agreements contained an exclusivity clause by which DSD bound itself to only purchase collection and sorting services from one collector company at a time.[62] Moreover, the Service Agreements, and with them the exclusivity clauses, were "unusually long-lasting".[63] This long-term exclusivity provision significantly hampered access to the market for the collection and sorting of household packaging waste by other collector companies.[64]

The long-term exclusivity agreement was functional to the organisation of the DSD collection and recovery system pursuant to the Packaging Ordinance. However, the agreement restricted competition pursuant to Article 101(1) TFEU. Therefore, the potential existed for a conflict between competition policy and environmental policy, insofar as the objective of the Packaging Ordinance could have been jeopardised by the application of competition policy. At the same time, the objective of competition policy – protecting competition – risked being frustrated if the Commission allowed the Service Agreements to stand. A trade-off existed between the objective of European competition law and the objective of the Packaging Ordinance and of the Service Agreements, which the Commission was called to solve.

The Commission solved the conflict by giving primacy to the environmental policy objective and therefore exempting the agreements under Article 101(3) TFEU. The Commission noted how the Service Agreements pro-

[58] *Ibid.,* paras. 17, 19. An "extensive system" is a system that guarantees the collection of waste throughout a territory. Such a system can only be recognised by competent administrative bodies.
[59] *Ibid.,* para. 27.
[60] *Ibid.,* para. 127.
[61] *Ibid.,* para. 31.
[62] *Ibid.,* paras. 121, 124.
[63] *Ibid.,* paras. 129–130.
[64] *Ibid.,* para. 140.

vided for "practical steps to implement [the] environmental objectives [of the German Packaging Ordinance and of the Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging waste] in the collection and sorting of used sales packaging collected from households and equivalent collection points".[65] Moreover, the Commission interpreted competition law provisions in the light of environmental policy objectives by subsuming[66] them under the exemption conditions of Article 101(3) TFEU.[67] First, the Commission interpreted the environmental objectives as relevant benefits under the first condition of Article 101(3).[68] Second, the Commission noted that consumers would be allowed a fair share of those benefits. The scale and scope advantages that an extensive collection system such as DSD could achieve would be translated into cost savings, and the cost savings, in turn, would be passed on to consumers. Moreover, consumers would "benefit as a result of the improvement in environmental quality sought, essentially the reduction in the volume of packaging".[69] Finally, the Commission noted that a long-term exclusivity clause was necessary in order to recoup the planned volume of the investment and therefore was indispensable for bringing about the related environmental benefits.[70] However, the exclusivity clauses did not need to be as long-term as the ones imposed by DSD. Therefore, the Commission decided that the exclusivity clauses would be exempted from the prohibition of anticompetitive agreements if they did not last further than the end of 2003 – the time after which the Commission considered that exclusivity was no longer necessary.[71]

4.2.3 Redundancies

A redundancy is "a situation in which something is unnecessary because it is more than is needed".[72] Applying the definition to the domain of policies,

[65] *Ibid.,* para. 143–144.

[66] See COMMISSION: *Guidelines on the application of Article 81(3) of the Treaty* (Communication), 2004, OJ C 101/97, para 42.

[67] One can read Article 101(3) TFEU as a policy coordination mechanism embedded within competition law, which allows competition policy to be set aside in the presence of conflicts with other policy objectives. See below (Section 5).

[68] See DSD (note 54), para. 143.

[69] *Ibid.,* para. 148.

[70] *Ibid.,* paras. 155, 156.

[71] *Ibid.,* para. 179.

[72] Cambridge Dictionary Online. Online: https://dictionary.cambridge.org/it/dizionario/inglese/redundancy (quoted 1 July 2022).

a redundancy is a situation in which a policy is unnecessary because it does something more than what is needed – in other words, the objective that the policy is designed to achieve can already be achieved through existing policies. Therefore, the redundant policy's net effect is zero. Unlike in the case of conflicts, the application of the redundant policy does not run counter to the objective of another policy – simply, it does not do anything in its favour. At the same time, however, resources are still being employed for deploying the redundant policy instrument, rather than being put to other uses.[73]

The *Energy Agreement* case offers an example of redundancy between two policy instruments. Summarised, the relevant facts are as follows: in the context of a government initiative to increase the share of renewable energy in the Netherland's total energy consumption, several electricity producers, representing around 10% of the electricity production in the Netherlands, entered into an agreement to close down five coal-fired power plants.[74] Because of the substantial share of the electricity market detained by the five coal-fired power plants, the agreement restricted competition in the electricity sector and would have resulted in the increase in electricity prices across the Dutch market.[75] The agreement thus fell under Article 101(1) TFEU and Section 6(1) of the Dutch Competition Act (*Mededingingswet*). In this context, the Dutch competition authority was called on to assess whether the agreement's benefits in terms of emission reductions of CO_2, SO_2, NOx and particles could outweigh the harm to consumers from the agreement due to the increase in electricity prices. If the benefits were higher than the harm to consumers, the agreement would have been exempted under Article 101(3) TFEU and Section 6(3) of the Dutch Competition Act. But did the agreement really result in *net* emission reductions?

The question arose because the existence of caps on emissions affected the net emission reduction effect from the agreement. The EU Emission

[73] It must be noted that redundancy is not always detrimental. At times, redundancy can be functional and serve meaningful policy objectives [see PETERS (note 28), p. 13]. For example, redundancy can make a system more resilient by differentiating supply chains and mitigating the impact of supply shocks. See for example HAWKER, N.W., EDMONDS, T.N.: *Avoiding the Efficiency Trap: Resilience, Sustainability, and Antitrust*. In: The Antitrust Bulletin, Vol. 60, No. 3, 2015, p. 214, 218–219, ISSN: 0003-603X.

[74] ACM: *Analysis of closing down 5 coal power plants as part of the SER Energieakkoord*, 2013, p. 2. Online: https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf (quoted 1 July 2022).

[75] *Ibid.*

Trading System applied to the plants covered by the agreement[76] and national caps were in place for NOx and SO_2 emissions. The Emission Trading System, which was first enacted by the 2003 Directive,[77] creates a market for CO_2 emission allowances. It does so by setting a maximum threshold (cap) of CO_2 emissions for the whole Emission Trading System area and by allocating emission allowances to undertakings so that the total number of allowances equals the cap. Undertakings then are free to trade the emission allowances among each other.[78] Undertakings whose emission abatement costs are lower than the price of the allowances are incentivised to take emission reduction measures. Undertakings whose emission abatement costs are higher, instead, can purchase allowances from undertakings having a surplus of allowances.[79]

The existence of a cap on emissions under the Emission Trading System means that no more than the CO_2 emissions allowed by the cap can be emitted in the areas and sectors covered by the Emission Trading System. At the same time, the existence of a cap at the aggregate level also means that there is no incentive to reduce emissions beyond the level set by the cap. If the coal-fired power plants were closed as a result of the agreement, their emission allowances, unless destroyed, would be freed up and possibly be sold to other undertakings under the Emission Trading System. The other undertakings could have used the allowances to increase their own emissions by an amount equal to the emission reduction achieved by the Agreement. A similar thing would happen with respect to NOx and SO_2 emissions: given that they were capped at national level, eliminating the emissions from the coal-fired power plants would allow an increase in emissions somewhere else in the Netherlands, up to the quantity set by the cap.

[76] Electricity and heat generation are included in the ETS. See COMMISSION: *EU Emissions Trading System* (EU ETS). Online: https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en (quoted 1 July 2022).

[77] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC*, 2003, OJ L 275/32.

[78] See *Ibid.*; FLORENCE SCHOOL OF REGULATION: *EU Emission Trading System* (EU ETS), 19 February 2021. Online: https://fsr.eui.eu/eu-emission-trading-system-eu-ets/#:~:text=The%20EU%20ETS%20covers%20carbon,%2C%20pulp%2C%20paper%2C%20cardboard%2C (quoted 1 July 2022); KINGSTON, HEYVAERT, ČAVOŠKI (note 51), p. 289–297.

[79] See FLORENCE SCHOOL OF REGULATION (note 78); KINGSTON, HEYVAERT, ČAVOŠKI (note 51), p. 289–297.

This phenomenon, whereby, due to the existence of a maximum emission cap set at an aggregate level, individual actions to reduce emissions do not result in aggregate net emission reductions under the cap, is called "waterbed effect".[80] Because of the waterbed effect, the agreement would not have produced net reductions in emissions of CO_2. In terms of net emission reductions, the added effect of the agreement with respect to the EU Emission Trading System was zero: in this sense the agreement, as a policy instrument, was *redundant* with respect to the Emission Trading System. Rather, the relevant policy effect of the agreement was that fewer costs would be incurred for emission reductions elsewhere, both for CO_2 emissions and for SO_2 and NOx emissions.[81] However, these avoided costs were not high enough to compensate for the consumer harm resulting from the increased electricity price.[82]

4.2.4 Gaps

A gap is "an empty space or opening in the middle of something or between two things".[83] Applied to policy, the word "gap" can be used to indicate a situation where a certain policy problem is not covered by any applicable policy instrument.

Compared to conflicts and redundancies, gaps are harder to identify, because they materialise as an *absence*: the absence of policy instruments to tackle a certain policy problem, or to advance a certain policy objective. The absence of something is very hard, if not impossible, to prove. One can, however, deduce the non-existence by relying on a proxy. A possible proxy for the existence of a policy gap could be the existence of a problem that is close to two policy instruments but does not fit neatly in any of them, and that per-

[80] APUNN, K.: *National climate measures and European emission trading: Assessing the "waterbed effect"*. Clean Energy Wire, 4 April 2019. Online: https://www.cleanenergywire.org/factsheets/national-climate-measures-and-european-emission-trading-assessing-waterbed-effect (quoted 1 July 2022).

[81] ACM (note 74), p. 4, 5.

[82] *Ibid.,* p. 6. The Dutch Competition Authorities left two questions unaddressed: first, whether the waterbed effect was really in existence (at the time of the agreement, emission allowances' prices were at an all-time low due to oversupply); second, why the enterprises did not make use of the possibility to cancel allowances, which existed pursuant to Article 12(4) of Directive 2003/87/EC. In spite of these open questions, the example of the Energy Agreement provides a good illustration of the redundancy dynamics between competition policy and environmental policy.

[83] Cambridge Dictionary Online. Online: https://dictionary.cambridge.org/it/dizionario/inglese/gap (quoted 1 July 2022).

sists even once the two policy instruments have been applied. Another possible proxy for the existence of a gap in policy instruments could be the fact that, during the design or implementation of a policy instrument, a problem or objective was identified by relevant actors, but the policy instrument did not tackle the policy problem.

A case that can illustrate how a policy gap between competition policy and environmental policy can be identified is the *Bayer/Monsanto* merger case. The Bayer/Monsanto merger was the last of a series of mergers in the agro-industry, following the merger between Dow and Dupont and that between ChemChina and Syngenta. The European Commission investigated the merger and found that Bayer and Monsanto were active in several of the same markets, including markets for seeds, herbicides and herbicide systems, as well as the market for the provision of digital agriculture services.[84] Given the overlaps between Bayer and Monsanto's activities in these markets, the merger would have resulted in significant restrictions of competition. The Commission therefore imposed several commitments on the merger, consisting in the divestiture of a number of assets by Bayer to a suitable buyer, identified in the company BASF. Conditionally on the commitments, the Commission cleared the merger.

During the assessment of the merger, several civil society organisations pointed out potential harms from the merger in addition to competition harms. The main concerns that civil society representatives voiced arose from fear that the merger would result in excessive power concentration in the market for seeds and pesticides.[85] Among other initiatives, an open letter was sent to the European Commission, signed by around 200 organisations, which highlighted various concerns with the Bayer/Monsanto merger as well as with the Dow/Dupont and the ChemChina/Syngenta mergers.[86] With respect to environmental concerns, the letter highlighted that:

[84] COMMISSION: *Mergers: Commission clears Bayer's acquisition of Monsanto*. Press Release, 21 March 2018. Online: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2282 (quoted 1 July 2022).

[85] See Bayer/Monsanto (Case M.8084) Commission Decision C (2018) 1709 final, para. 3009; HIRST, N., MARKS, S.: *Vestager ramps up pressure on Bayer-Monsanto mega-merger*. POLITICO, 15 December 2017. Online: https://www.politico.eu/article/vestager-ramps-up-pressure-on-bayer-monsanto-mega-merger/ (quoted 1 July 2022).

[86] Open letter to the European Commission on agri-business mergers, 27 March 2017. Online: https://corporateeurope.org/sites/default/files/attachments/mergers_letter_final_signed.pdf (quoted 1 July 2022).

> "Reduced diversity of farming, and greater dominance of monoculture farming highly reliant on chemical inputs including hazardous pesticides, would further harm the environment, biodiversity and human health – including that of farmers and workers."[87]

In addition, three organisations were admitted in the merger assessment procedure as interested third parties under Article 18(4) of the Merger Regulation and issued comments on the Commission's statement of objections.[88] With respect to the environmental concerns raised by the merger, the organisations argued that the Commission "should assess the impact of the merger […] also in terms of loss of biodiversity as a harm to environment."[89]

The Commission tackled the concerns raised by the interested third parties in the decision. The Commission acknowledged that, in light of recital 23 of the Merger Regulation, the assessment of the merger was contextualised within "the general framework of the achievement of the fundamental objectives referred to in the EU Treaties". Therefore, the Commission had "paid specific attention in its review to ensure that post-Transaction innovation in the agroindustry sector [would be] preserved as the key for the emergence of more effective, healthier, safer and more environmentally-friendly products".[90] However, the Commission stated that, by virtue of the principle of conferral of powers, the European Commission could not intervene against a merger "on grounds other than the protection of competition".[91] Indeed, the Commission stated, the Merger Regulation is adopted specifically for "the objective of ensuring that competition in the internal market is not distorted".[92] In particular, the Commission "can intervene against mergers only on competition grounds" and is "obliged to clear a merger when its competition appraisal, taking into account all relevant criteria, concludes

[87] *Ibid.,* p. 1.

[88] Bayer/Monsanto (note 85), para. 27.

[89] *Ibid.,* para. 3007.

[90] *Ibid.,* para. 3011.

[91] *Ibid.,* paras. 3014, 3017, 3022. Kingston also points out that the difficulty of integrating environmental concerns fully into the core of competition policy is in part due to the structure of the Treaty itself and the principle of attributed powers, which has influenced governance structures, such as the EC. See KINGSTON (note 51), p. 438; see also below (Section 4).

[92] Bayer/Monsanto (note 85), para. 3016; *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* (the EC Merger Regulation), 2004, OJ L 24/1, recital 6.

that it does not significantly impede effective competition."[93] The merger thus was cleared, albeit with commitments.

In the *Bayer/Monsanto* merger case, the engagement of individuals, civil society organisations and business organisations with the Commission, both informally and as interested third parties in the merger procedure, allowed to identify a potential policy coverage gap between competition policy and environmental policy. The potential gap consisted in the fact that several environmental concerns, in particular a risk of biodiversity loss and environmental harm as a result of the increased use of agrochemical products, which arose as a result of the merger, were left unaddressed. The potential gap arose because of the limits to the legal mandate of the Commission.

4.3 Two Forms of Coordination in Competition Policy

A policy coordination lens not only provides a comprehensive and concrete understanding of the problems arising out of the interaction of competition policy and environmental policy. In addition, policy coordination can help illuminate the different ways in which coordination efforts can affect competition policy. In fact, different depths of coordination can lead environmental concerns to play a different role in competition policy. The present Section analyses different approaches to the integration of environmental concerns in competition policy focusing on a particular distinction: that between a static and a dynamic view of coordination.

4.3.1 Forms of Coordination: Static and Dynamic Views

The definition of coordination in Section 2 introduced a distinction between different forms of coordination. The distinction places different forms of coordination onto a scale: from the loosest form, negative coordination, which consists in avoiding punctual discrepancies between policies; to the deepest form of coordination, which promotes a holistic vision of government and aims at developing strategies across policy sectors.[94] While the looser forms of coordination do not require to change the object or the objectives of a policy, but only demand punctual adjustments, the deeper forms affect the fundamental structures of a policy, placing the sectoral policies themselves at

[93] Bayer/Monsanto (note 85), paras. 3020, 3021.
[94] PETERS (note 22), p. 5–7.

the service of an overarching goal.[95] Looser forms of coordination will likely produce effects on the coordination of policy instruments and of implementation procedures.[96] However, looser forms of coordination are less likely to affect a policy's objects or objectives.[97] Deeper forms of coordination, instead, aim at identifying and promoting common understandings of policy problems and solutions across policy sectors, and therefore affect the definition of policy objects and objectives.[98] In particular, central to deeper forms of coordination is the notion of *frames*, understood as "perspectives from which an amorphous, ill-defined, problematic situation can be made sense of and acted on".[99] Frames define policy problems, policy objectives and the perception of a policy's role,[100] and shifts in the framing of a policy issue can give rise to new perspectives on policy problems and to new solutions.[101]

These different forms of coordination can be traced back to different visions of the nature of a policy: looser forms of coordination translate a static vision, while deeper forms of coordination translate a dynamic vision. If a policy is understood as static, meaning that its object and objectives are not subject to change, only looser forms of coordination will be possible. Instead, if a policy is understood as dynamic, meaning that its fundamental structures can evolve, also deeper forms of coordination will apply. Moreover, the

[95] See PERSSON (note 30), p. 36: "To summarise, it can be argued that there are two general approaches towards the achievement of EPI: first, the toolbox approach, which involves identifying concrete measures that can be implemented in the short to medium-term, and second, the longer-term policy reform approach, which involves trying to change fundamental structures in policy-making".

[96] See BRIASSOULIS (note 30), Chapter 1; BRIASSOULIS (note 16), p. 16–18.

[97] See BRIASSOULIS (note 30), p. 22; BRIASSOULIS (note 16), p. 16–18.

[98] See for example PETERS (note 7) p. 4, 65–66, 68. According to Peters, policy integration "is facilitated by the development of comprehensive policy ideas – such as social inclusion, competitiveness, or sustainability – to guide the actions of a range of policy actors".

[99] REIN, M., SCHÖN, D.: *Reframing Policy Discourse*. In: The Argumentative Turn in Policy Analysis and Planning, 1st edition, Durham, N.C.: Duke University Press, 1993, p. 146, ISBN: 978-0-8223-8181-5.

[100] See NILSSON, M.: *Learning, Frames, and Environmental Policy Integration: The Case of Swedish Energy Policy.* In: Environment and Planning C: Government and Policy, Vol. 23, 2005, p. 209, ISSN: 0263-774X.

[101] It should be noted that not all coordination problems require to take a dynamic approach to coordination. Many of them, in fact, can successfully be dealt with by providing punctual coordination mechanisms at the implementation level of a policy. For example, in the Energy Agreement case only punctual mechanisms for exchange of information about the effect of the EU Emission Trading System were needed, rather than a perspective change in competition policy. However, arguably in other cases of conflicts a policy reform approach may be needed.

difference between a static and a dynamic view of coordination also lies in the time frame of the coordination effort.[102] Take the example of the interested third-party intervention in the *Bayer/Monsanto* merger case. In the punctual case – therefore, in a short-term frame – the information that the interested third-party intervention can provide to the Commission will result in a more complete picture of the environmental issues at hand. Therefore, they will enable better informed decision-making. However, the third-party intervention will not change how the competition authority sees its mandate, nor the weight it gives to environmental concerns.[103] In a longer-term perspective, instead, it is possible to hypothesise that the constant exposure to information about the environmental aspects of competition cases may systematically increase the importance that such environmental aspects have in the assessment of competition law cases.

4.3.2 Static and dynamic coordination in competition policy

The distinction between a static and a dynamic vision of coordination reflects different understandings of the nature of the sectoral policy to be coordinated – in the case of this research, competition policy. If competition policy is understood in a static way, that is as a fixed policy, whose frame of reference is already set, then only static, punctual coordination is possible. On the other hand, if competition policy is understood in a dynamic way, as subject to change and evolution, then also dynamic coordination can be envisaged.

EU competition policy has both static and dynamic elements, which are in tension with each other. On the one hand, EU competition policy is already defined, by both the wording of the Treaties and by applicable caselaw,[104] so that competition policy encounters environmental policy not at the design stage, but at the implementation stage.[105] This fixed dimension of competition law is evident in several interpretations of the environmental integra-

[102] See PERSSON (note 30), p. 36.

[103] See ALVES, C.-M. : *La protection intégrée de l'environnement en droit communautaire*. In: Revue Européenne de Droit de l'Environnement, Vol. 7, No. 2, 2003, p. 139–141, ISSN: 1283-8446.

[104] See NOWAG (note 37), p. 7–8, 48.

[105] See PETERS (note 7), p. 14, 15. See also KRÄMER, L.: *EU Environmental Law*, 8th edition, London: Sweet & Maxwell/Thomson Reuters, 2015, 578 p., ISBN 978-0414050259. At p. 22, Krämer states that it is doubtful whether the integration principle applies to individual measures – such as a competition law decision.

tion principle[106] as applied to competition law. The analysis of the integration principle provided by two extensive studies of the interaction between competition law and environmental concerns, respectively by Kingston and Nowag, can illustrate this point. Kingston argues that the integration principle demands that environmental concerns are given priority over competition concerns. However, this is possible only *when the Treaty allows an interpretation of competition law that leaves space for integration*.[107] In a similar vein, Nowag argues that integration requires finding synergies – or balancing – between competition law objectives and environmental objectives *within the limits of the Treaties and relevant caselaw*.[108]

Such a static dimension of competition policy allows for limited integration of environmental concerns. On the one hand, it does seem to allow solutions such as subsuming sustainability and environmental protection under product quality,[109] or considering consumers' Willingness To Pay for more sustainable products.[110] However, other solutions, like taking into account environmental harms in the analysis of efficiencies brought about by agreements and mergers, are more controversial.[111] Still other, more radical solutions, such as enforcing competition law against unsustainable business practices,[112] seem even harder to justify under a static view, because they would demand potentially too radical a revision of the goals and tests of competition policy. Kingston, for example, states that the integration principle cannot justify enforcing competition law against practices that harm the environment but produce no anticompetitive outcome.[113]

On the other hand, EU competition policy has a dynamic and evolutionary dimension, which invests its scope and its goals. At the same time as it maintains stable characteristics, EU competition policy evolves over time.[114]

[106] Article 11 TFEU.
[107] KINGSTON (note 51), p. 115–117.
[108] NOWAG (note 37), p. 9.
[109] See for example VOLPIN, C.: *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*. Competition Policy International, 28 July 2020. Online: https://www.competitionpolicyinternational.com/sustainability-as-a-quality-dimension-of-competition-protecting-our-future-selves/ (quoted 1 July 2022).
[110] See for example THOMAS, S., INDERST, R.: *Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis*. SSRN, 05 July 2021. Online: https://www.ssrn.com/abstract=3755806 (quoted 1 July 2022).
[111] See for example NOWAG (note 37), p. 260–262.
[112] See for example IACOVIDES, VRETTOS (note 48).
[113] See KINGSTON (note 51), p. 116–117.
[114] EZRACHI (note 1), p. 21.

The evolutionary nature of EU competition policy becomes evident if one observes it at different moments in time: the objectives assigned to competition law have developed and shifted through the years, albeit without any change in the Treaty competition rules. A multiplicity of objectives co-exist in European competition law,[115] among which the most prominent are economic freedom, market integration and economic efficiency.[116] While in the first decades of EU competition law enforcement the Commission emphasised the goals of market integration and economic freedom, starting in the 1990s the focus of competition enforcement has gradually evolved towards the primacy of economic efficiency and consumer welfare; at the same time, the role of economic freedom has been marginalised.[117]

If European competition policy has a double nature, both fixed and evolutionary, then pertinent approaches for coordinating between competition policy and environmental policy can be both a static approach and a dynamic approach. Therefore, both perspectives are worth examining. Indeed, a quick glance reveals that both types of coordination are already at play in the competition-environment interface. For example, in the *DSD* case competition law was punctually lifted in order to avoid conflict with an environmental regulation. However, competition law's core aim and standards remained the same, as is shown by the emphasis the Commission placed on *consumer* benefits deriving from the agreement.[118] Instead, the reference to sustainable development in the Commission's Draft Horizontal Guidelines can be understood as an instance of reframing, because it links competition policy to an overarching policy objective.[119] Another example is provided by the Draft Guidelines recently issued by the Dutch Competition Authority. The Draft Guidelines provide that, in a limited number of cases, benefits accruing to society as a whole can be taken into account for the purposes of

[115] STYLIANOU, K., IACOVIDES, M.: *The Goals of EU Competition Law – A Comprehensive Empirical Investigation*. In: SSRN Journal, 2020, ISSN: 1556-5068. Online: https://www.ssrn.com/abstract=3735795 (quoted 1 July 2022).

[116] MONTI (note 1), p. 20–21.

[117] *Ibid.,* p. 20, 48. See also the reconstruction of the shift to a more economic approach in GERBER, D. J.: *Two Forms of Modernization in European Competition Law*. In: Fordham International Law Journal, Vol. 3, No. 5, 2007, p. 1235–1265, ISSN: 0747-9395.

[118] DSD (note 54), para 148.

[119] COMMISSION: *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Annex to a Communication by the Commission,* C (2022) 1159 final, paras. 542–543.; see also PETERS (note 22), p. 13.

exempting an agreement,[120] thereby challenging the established framing of EU competition policy as designed to protect consumer welfare.

4.4 Policy Coordination and the Integration Principle in Article 11 TFEU

As already noted, the Treaty framework regarding the treatment of environmental concerns in competition law – as well as in the other EU policies – is set by Article 11 TFEU, which states that "Environmental protection requirements *must be integrated* into the definition and implementation of the Union's policies and activities, *in particular with a view to promoting sustainable development*".[121] In addition to Article 11 TFEU, Article 3 TEU and Article 7 TFEU are relevant for the interaction between competition policy and environmental policy. Article 3 TEU enunciates the EU's aims. Among them, at paragraph 3, reference is made to the "sustainable development of Europe" and to "a high level of protection and improvement of the quality of the environment". In addition, Article 7 TFEU mandates that "the EU shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". Article 37 of the Charter of Fundamental Rights of the European Union completes the framework by restating the integration obligation. According to Article 37 of the Charter, "[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

The integration principle was inserted in the EEC Treaty in 1987 by the Single European Act, which introduced a Title on Environment (Title VII).[122] Within Title VII, the integration principle was contained in the newly inserted Article 130r(2) and, in its original formulation, stated that "[e]nvironmental protection requirements shall be a component of the Community's other

[120] See ACM: *Revised Draft Guidelines – Sustainability Agreements: Opportunities within Competition Law*, 2021, paras. 8, 46, 48–49. Online: https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf (quoted 1 July 2022).

[121] Emphasis added.

[122] *Single European Act*, 1987, OJ L 169/1.

policies".[123] In 1993, the Maastricht Treaty[124] brought about several changes to Article 130r(2) EC, which served to clarify and strengthen the integration principle.[125] First, the wording of the Article was modified from "shall be a component of" to "must be integrated into". Moreover, the Maastricht Treaty added the wording "into the definition and implementation of other Community policies" to the text of the Article. In 1999, then, with the entry into force of the Treaty of Amsterdam,[126] the principle was moved to Article 6 EC, in Part One of the EC Treaty, which contained the Community's principles. Thus, the principle was made horizontally applicable to all European sectoral policies.[127] Moreover, the Treaty of Amsterdam established a connection between environmental protection and sustainable development, by stating that environmental integration should take place 'in particular with a view to promoting sustainable development'.[128]

Applied to competition law, the integration principle can first and foremost be understood as a principle of interpretation. In Wasmeier's words, by virtue of the integration principle, EU law "should basically be interpreted in a way that renders it consistent with environmental protection requirements."[129] However, coordination between policies is not only a matter of interpretation of legal provisions: interpreting the norms of competition law so as to make them consistent with environmental protection is only one out of many factors that influence coordination between competition policy and environmental policy. Legal interpretation was useful in *DSD*, where the Commission solved the conflict between competition law and the Packaging Ordinance by reading the facts of the case in the light of the environmental objectives pursued by the Packaging Ordinance[130] and by subsuming environmental policy objectives under the exemption conditions of Article 101(3) TFEU.[131] In other cases, however, legal interpretation does not help solving coordination problems – either because the relevant coor-

[123] Article 130r(2) EC.

[124] *Treaty on the European Union,* 1992, OJ C 191/1.

[125] See NOWAG (note 37), p. 16–17.

[126] *Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts*, 1997, OJ C 340/1.

[127] See NOWAG (note 37), p. 17.

[128] See *Ibid*.

[129] WASMEIER, M.: *The Integration of Environmental Protection as a General Rule for Interpreting Community Law*. In: Common Market Law Review, Vol. 38, No. 1, 2001, p. 162, ISSN: 0165-0750.

[130] DSD (note 54), paras. 143–144.

[131] *Ibid.,* paras. 143, 148, 153–155.

dination problem does not reside (only) in the legal text; or because the legal text cannot be interpreted in a way that would solve the problem. For example, legal interpretation was irrelevant for solving the redundancy in the *Energy Agreement* case: the redundancy, in fact, resided in the practical effect of the EU Emission Trading System on net emission reductions, not in the interpretation of competition law.[132] Moreover, in *Bayer/Monsanto*, the very existence of a potential policy gap was manifested – and the Commission was pushed to address it – through the interested third-party interventions as well as through pressure from civil society organisations, business organisations and individual citizens.[133] In the *Bayer/Monsanto* case, legal interpretation represented only one out of several relevant variables: while legal interpretation determined whether competition law could solve the alleged coordination problem, citizen involvement played an important role by highlighting the presence of the problem in the first place.

Indeed, two of the major works to date about the interface between environmental concerns and competition law recognise that the issue has a dimension going beyond legal interpretation. Nowag notes that the integration principle not only impacts the interpretation of Union law but has also had an effect at the political level in the EU, in particular through the Cardiff Process.[134] Kingston, moreover, recognises that the integration principle represents just one facet of the relationship between competition law and environmental protection.[135]

In sum, the integration principle as a rule of interpretation of competition law can only paint a partial picture of the relationship between competition policy and environmental policy. Legal interpretation is a relevant factor for the coordination of the two policies, but it does not exhaust the range of relevant factors. A variety of factors other than the interpretation legal text can provide obstacles and instruments for the coordination of competition policy and environmental policy. This is not to say that the legal dimension,

[132] See Section 3.

[133] See *Ibid*.

[134] See *European Council Conclusions of 15–16 June 1998*. Online: https://www.europarl.europa.eu/summits/car1_en.htm#:~:text=II.-,ECONOMIC%20AND%20MONETARY%20UNION,Bank%20on%201%20June%201998 (quoted 1 July 2022), paras. 32-36. The Cardiff Process, launched in 1998 by the European Council, aimed at strengthening the integration of the environment and sustainable development into sectoral policies by developing sectoral integration strategies at the level of the Council of Ministers.

[135] KINGSTON (note 51), Chapters 3, 4, 5.

and in particular the integration principle,[136] lose any of their relevance: on the contrary, the legal framework provides the limits within which the other factors relevant for policy coordination operate. However, to get a comprehensive understanding of the relationship between competition policy and environmental policy, it is necessary to go beyond the legal dimension and explore in detail the variety of coordination instruments available to competition authorities for coordinating competition policy and environmental policy.

Conclusion

This paper started from the premise that sustainable development and environmental protection are recognised as relevant objectives and policy priorities in the EU and that the application of competition policy should not run counter to these objectives. Against this background, it is important to understand how competition authorities in the EU manage the interaction between competition policy and environmental policy in a way that furthers sustainable development. Policy coordination can provide a useful perspective to look at the interaction between competition policy and environmental policy, providing tools for understanding the concrete relationship between the two policies and suggesting meaningful avenues for further research.

Taking a policy coordination perspective provided three main insights: first, it allowed to paint a comprehensive picture of the complex relationship between competition policy and environmental policy, by isolating the various dynamics that can occur between them. Second, taking a policy coordination perspective allowed to develop an understanding of the relationship between competition policy and environmental policy that takes into account the specificities of competition policy, by differentiating between static and dynamic forms of coordination. Third, a policy coordination perspective allowed to see how the legal dimension is a crucial, but not the exclusive,

[136] It should be noted that the extent to which Member States are bound by the integration obligation is debated. Nowag, for example, argues that the integration obligation applies to Member States whenever they implement or apply Union law. On the contrary, Dhondt argues that the integration obligation can only apply indirectly to Member States, through secondary legislation or through the duty of loyal cooperation. [See NOWAG (note 37), p. 21–24]; DHONDT, N.: *Integration of Environmental Protection into other EC Policies: Legal Theory and Practice*, 1st edition, Groningen: Europa Law, 2003, p. 30–38, ISBN: 9789076871158.

relevant factor for managing the interaction between competition policy and environmental policy.

The interplay between competition policy and environmental policy is an important factor for bringing about environmental protection, and for doing so in a cost-effective way. Therefore, competition authorities across the EU should have the tools to identify the dynamics arising between competition policy and environmental policy, and to solve potential coordination problems, in order to maximise the synergies between competition policy and environmental protection.

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5 ECOCIDE AS A NEW CRIME UNDER INTERNATIONAL LAW: UTOPIA OF THE PROTECTION OF THE ENVIRONMENT?

Ľudmila Elbert

Abstract

Environmental protection is currently one of the most pressing issues of international law. Although, on the one hand, states and other actors are aware of the need to protect the environment from irreversible negative changes, they are unable to reach consensus on clear and enforceable environmental protection rules. An example can be the ecocide itself, as a proposal for a crime consisting in the most serious damage or irretrievable destruction of the environment. There are several proposals to enshrine it as a crime under international law, but it has been unsuccessful for more than 50 years. The aim of this paper is not to offer an exhaustive overview of the possibilities of the legislation applicable to the ecocide, but rather to point out that it is not a new concept and the international community may not be able to reach the necessary consensus even after modifying the proposals presented.[1]

Introduction

The environment is currently the most important object of the desired protection for the preservation of humanity as such. The various natural disasters are increasingly drawing our attention to the need to slow down climate change, which exposes different parts of the world to unbearable conditions for the lives of their inhabitants. Many disasters affecting the environment have their basis in human activity, which often begins innocently in order to achieve human well-being. Negative climate changes cause e.g. oil spill during its extraction or transport by tankers across the oceans for the purpose of processing it for fuel or excessive logging in forests for expansion of agricultural land or construction of houses or furniture production. One form of efforts to slow down such climate change is proposals to classify the ecocide

[1] The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)".

as a new crime under international law, which is intended to serve both preventive and punitive. However, the existence of various proposals to enshrine the ecocide, whether as a crime under international law or within the framework of national law, suggests that despite the efforts of scientists, translating it into reality may be more of a utopia. It is understandable that states do not want to take responsibility for the actions of entrepreneurs fulfilling the features of the ecocide. Likewise, the direct responsibility of business entities as legal entities remains problematic in many countries.

The purpose of the paper is not to provide an exhaustive overview of efforts to legally translate the ecocide into legislation as a crime under international law, but to demonstrate on examples that, despite the great efforts of scientists or international intergovernmental or non-governmental organizations, states are still unwilling and collective uncapable of legally committing itself to the adoption of international mechanisms for the prosecution of the ecocide. It is only at the discretion of the reader whether irreversible destruction of the environment is worthy often just a one-time economic proceeds of perpetrator. The paper contains examples of the existed proposals for the crime of ecocide and by the method of analysis and comparison it presents their positives and negatives. The method of deduction results in the view that the notion of an ecocide, legally enshrined as the fifth crime under international law, is rather an unattainable utopia.

5.1 The concept of Ecocide

Ecocide emerges as a legal problem in connection with widespread environmental devastation, e.g. as a result of the extraction of oil from tar sands in Canada destroying Boreal forests,[2] mining of metals in Finland at the Talvivaara surface quarry, where toxic metals have been leaked several times; and waste substances into the environment and waters,[3] surface coal extraction by removing mountain ridges by explosives in the Appalachian mountains in the USA, whose environment becomes unrenewable,[4] by extract-

[2] See e.g. *Tarnished Earth: the destruction of Canada's boreal forest*. Online: https://www.theguardian.com/environment/gallery/2010/sep/07/tarnished-earth-oil-sands (quoted 1 July 2022).

[3] See e.g. *Talvivaara Mine Environmental Disaster*. Online: http://www.ejolt.org/2015/07/talvivaara-mine-environmental-disaster/ (quoted 1 July 2022).

[4] See e.g. *Mountaintop Mining Is Destroying More Land for Less Coal, Study Finds*. Online: https://insideclimatenews.org/news/26072018/appalachia-mountaintop-removal-coal-strip-mining-satellite-maps-environmental-impacts-data/ (quoted 1 July 2022).

ing oil in the Niger Delta destroying mangrove plantations,[5] or destroying forests in Ecuador,[6] not to mention the widespread and reckless deforestation in the Amazon, Borneo, etc. The term of ecocide was first mentioned by scientists during the Vietnam War, trying to label and stop environmental destruction and a possible human health catastrophe in the wake of the herbicidal war waged by the United States of America.[7] For the first time the term ecocide was used by the American biologist Prof. Arthur W. Galston at the 1970 Conference on War and National Accountability, in connection with the use of Agent Orange herbicide throughout Southeast Asia, on the development of which he himself worked.[8] He was aware of the devastating effects of herbicides and called for a halt to their use, which was ultimately ordered by Richard Nixon.[9] However, the first draft of the ecocide is usually associated with the name Richard A. Falk,[10] who, in the wake of the devastation of the environment in Vietnam, proposed International Convention on the Crime of Ecocide in 1973.

Thus, the formation of the ecocide as a crime under international law has been taking place since the 1970s.[11] According to Wojsyk,[12] ecocide means serious damage or destruction of ecosystems, or damage to the health or vi-

[5] See e.g. *A review of the threat of oil exploitation to mangrove ecosystem: Insights from Niger Delta, Nigeria*. Online: https://www.sciencedirect.com/science/article/pii/S2351989419306729 (quoted 1 July 2022).

[6] See e.g. *Oiled forests — the case of Ecuador*. Online: https://www.wrm.org.uy/bulletin-articles/oiled-forests-the-case-of-ecuador (quoted 1 July 2022).

[7] BILOTTA, A.: *Should the Rome Statute Include the Crime of Ecocide*? Online: https://www.e-ir.info/2019/08/28/should-the-rome-statute-include-the-crime-of-ecocide/ (quoted 1 July 2022).

[8] See more: BEDE, D.: Ekocída ako zločin proti životnému prostrediu podľa medzinárodného práva. In: JANKUV, J. (ed.): *Vývoj, aktuálne výzvy a Rule of Law medzinárodného práva životného prostredia: Zborník z medzinárodnej vedeckej konferencie „Vývoj a aktuálne výzvy medzinárodného práva životného prostredia" a medzinárodnoprávnej sekcie: „Princíp Rule of Law v medzinárodnom a európskom práve životného prostredia", ako súčasti medzinárodného vedeckého kongresu Trnavské právnické dni, 20.–21. septembra 2018*. Trnava: Právnická fakulta TU v Trnave. Bratislava: Wolters Kluwer, 2018, p. 95. ISBN 978-80-8168-991-8. Online: https:// www.truni.sk/sites/default/files/uk/f000112.pdf (quoted 1 July 2022).

[9] See more: CHIARINI, G.: *Ecocide: From the Vietnam War to International Criminal Jurisdiction? Procedural Issues In-Between Environmental Science, Climate Change, and Law*. p. 2. Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4072727 (quoted 1 July 2022).

[10] FALK, R. A.: *Environmetal Warfare and Ecocide Facts, Appraisal and Proposals*. Online: https://www.jstor.org/stable/44480206 (quoted 1 July 2022).

[11] *Ecocide Law: History*. Online: https://ecocidelaw.com/history/ (quoted 1 July 2022).

[12] WOJSYK, J.: *Ecocide – the genocide of the 21st century? Eastern European perspective*. On-

tal needs of species, e.g. as a result of war operations, disasters, toxic waste or air pollution, oil spills, soil erosion or plundering of natural resources. In the dictionary, ecocide is usually referred to as the destruction of the environment of a particular area or its extensive destruction.[13] In 2010, Polly Higgins[14] submitted a draft of the ecocide to the United Nations Commission on International Law, in the form of a proposal to amend the Rome Statute of the International Criminal Court (hereinafter referred to as the "Rome Statute").[15] It defined the ecocide as extensive damage, destruction or loss of the ecosystem of a particular territory, whether at the discretion of man or for any other reason, to the extent that the peaceful use of the users of that territory was seriously compromised. Higgins thus distinguishes between two types of the ecocide: man-made ecocide for which a particular government and entrepreneurs (both natural and legal persons) are responsible, and naturally occurring ecocide for which a particular government is responsible.

It would be appropriate to think about why the ecocide is not recognized as a crime under international law, despite the fact that it poses much greater risk to humanity's survival as such than recognised crimes under international law,[16] among which we include crimes against peace, crimes against humanity, the crime of aggression and the crime of genocide.

5.2 Proposals for Ecocide Conventions

The ecocide became the subject of research for several authors, experts in the field of law as well as natural sciences. This chapter focus on two draft conventions that aim to legally enshrine the ecocide as a crime under international law, in direct response to the widespread environmental devastation.

line: https://www.cirsd.org/en/expert-analysis/ecocide-%E2%80%93-the-genocide-of-the-21st-century-eastern-european-perspective (quoted 1 July 2022).

[13] See e.g. *Cambridge Dictionary*. Online: https://dictionary.cambridge.org/pl/dictionary/english/ecocide (quoted 1 July 2022).

[14] HIGGINS, P., SHORT, D., SOUTH, N.: *Protecting the planet: A proposal for a law of ecocide*. Online:https://www.researchgate.net/publication/257552825_Protecting_the_planet_A_proposal_for_a_law_of_ecocide (quoted 1 July 2022).

[15] Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 333/2002 Coll. on the adoption of the Rome Statute of the International Criminal Court (*Oznámenie Ministerstva zahraničných vecí Slovenskej republiky č. 333/2002 Z.z. o prijatí Rímskeho štatútu Medzinárodného trestného súdu*).

[16] *Note No. 8*, p. 89.

5.2.1 Falk's Proposal

Among the first proposals of the Ecocide Convention is the draft of the International *Convention on the Crime of Ecocide* (1973) prepared by Richard A. Falk,[17] following the failure of the international community to respond to massive environmental damage by the United States, as one of the permanent members of the United Nations Security Council, in Indonesia during the Vietnam War.

The draft convention defines the ecocide in Art. 2 as any act listed below committed with the intention to disrupt or destroy, in whole or in part, the human ecosystem:

(a) the use of weapons of mass destruction, whether nuclear, bacteriological, chemical or other;
(b) the use of chemical herbicides to defoliate and deforest natural forests for military purposes;
(c) the use of bombs and artillery in such quantity, density or size as to impair the quality of the soil or the enhance the prospect of diseases dangerous to human beings, animals or crops;
(d) the use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
(e) the use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
(f) the forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.

Not only the commission of the ecocide itself is considered to be punishable, but also the conspiracy leading to the commission of an ecocide, direct and public incitement to commit an ecocide, an attempt to commit an ecocide, as well as complicity in the ecocide (Art. 3). Anyone committing the ecocide in any form should be punished by depriving their leadership position or the trust of the public. Likewise, constitutionally responsible rulers, public officials, military commanders or private persons should be charged and convicted of such crimes (Art. 4).

The draft convention envisages the creation of a control mechanism in the form of the creation of the Ecocide Investigation Commission (hereafter "Commission") by the United Nations itself. Commission should be com-

[17] FALK, R. A.: *Environmental Warfare and Ecocide Facts, Appraisal and Proposals, Annex 1*. Online: https://www.jstor.org/stable/44480206 (quoted 1 July 2022).

posed of 15 international law experts and its primary task shall be to investigate allegations of ecocide brought by governments, by principal officer of any international institution, by a resolution of the General Assembly or the United Nations Security Council, or by a petition signed by at least 1000 private persons. All hearings of Commission has to be public. If the Commission decides by majority vote that none of the acts define as ecocide has been commited an ecocide, it shall issues a dismissal of the complaint with a short statement of reasons. However, if the Commission decides by majority vote that the ecocide has been committed or is being committed, it shall issue a cease and desist order, a statement recommending prosecution or sanction of specific individuals or groups, as well as statement of reasons supporting its decision. The recommendation should include whether the prosecution should take place under national, regional, international or *ad hoc* auspices (Art. 5). The author of this proposal himself considers this control mechanism defined in Art. 5 as the most controversial and leaves to consideration if it will be deleted altogether or appended as an optional protocol in order to achieve the widest possible adoption of the Convention on the Crime of Ecocide itself. The enforceability of its provisions shall also ensure the obligation of the Contracting States to adopt the necessary national legislation to ensure the provisions of the Convention and, in particular, to ensure the effective punishment of persons responsible for the crime of the ecocide in any form. The commission of the ecocide should be prosecuted by the competent judicial authority of the State in whose territory the ecocide was committed or by an international criminal court having jurisdiction over the parties concerned. Ecocide should not be considered as a political crime, so that this fact is not an obstacle to the extradition of those responsible persons (Art. 6, 7, 8). The final provisions concern the settlement of the disputes arising from the application of the Convention, the method of entry into force of the Convention, the period of validity, the possibility of revising the Convention, etc.

However, despite Falk's work, the convention has not yet been adopted. The reason for this may be the currently unacceptable definition of the ecocide formulated restrictively only in the state of war. However, his proposal did not go unnoticed. In 1978, the United Nations special rapporteur on the prevention and punishment of the crime of genocide, Nicodème Ruhashyankiko, prepared a Study on the issue of preventing and punishing the crime

of genocide,[18] where it is proposed, based on Falk's proposal, to consider the crime of ecocide as an international crime similar to genocide. However, his proposal was not successful either.

5.2.2 Neyretto's Proposal

Whereas Falk´s proposal deals with the definition of the ecocide in time of war, there is also another proposal prepared under the guidance of Prof. Neyretto.[19] His proposal has focused more comprehensively on the issue of environmental protection and presented proposals for two international conventions, the Convention against Environmental Crime (*Ecocrimes Convention*)[20] and the Convention against Ecocide (*Ecocide Convention*).[21] With regard to the subject of our contribution, we will focus only on the draft Convention against Ecocide and its comparation with the above mentioned clarification of Falk's proposal for the *Convention on the Crime of Ecocide*.

The preamble of the proposed Convention against Ecocide explains the need to adopt comprehensive legislation on the grounds that protection of the environment and the planet is the responsibility of the international community in its entirety. Although there are several legal instruments to protect the environment, there is no effective sanction mechanism for the elimination of impunity for persons responsible for gross environmental damage. It's the necessity to establish and strengthen the international criminal jurisdiction complementary to the national criminal jurisdictions to try the crime of ecocide. Directly from the preamble is clear that the authors of the draft of the Convention against Ecocide consider the ecocide to be a part of the field of criminal law. Falk rather just emphasizes the need for the very enshrinment of the crime of the ecocide and justifies its inevitability.

The draft of the Convention against Ecocide clearly states that it should apply without prejudice to the relevant rules of international humanitarian law prohibiting environmental damage at times of armed conflict. The application of its provisions concerns the most serious crimes against the environment, committed in peacetime and in times of armed conflict, affecting the safety of the planet. The ecocide is defined in Art. 2 as intentional acts com-

[18] *Study of the question of the prevention and punishment of the crime of genocide (UN Doc e/CN.4/sub.2/416).* Online: https://digitallibrary.un.org/record/663583 (quoted 1 July 2022).

[19] *From Ecocrimes to Ecocide: Protectin the Environment through Criminal Law*. Online: https://blog.uclm.es/repmult/files/2019/12/EcocideGB-072016.pdf (quoted 1 July 2022).

[20] *Ibid.*, p. 8–25.

[21] *Ibid.*, p. 26–42.

mitted in the context of a widespread and systematic action which has an adverse impact on the safety of the planet, among which we include:

(a) the discharge, emission or introduction of a quanitity of substances or ionising radiation into the air or atmosphere, soil, water or aquatic environment;
(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations, and after-care of disposal sites, including the action taken as a dealer or a broker in the framework any activity related to the waste management;
(c) a plant operation in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used;
(d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear material or other hazardous radioactive substances;
(e) the killing, destruction, possession or taking of specimens of wild fauna or flora spieces whether protected or not;
(f) other acts of a similar character committed intentionally that adversely affect the safety of the planet;

Activities adversely affecting the safety of the planet are the activies when they cause: 1. a widespread, constant and serious degradation of the quality of air or the atmosphere, the quality of soil or the quality of water, the fauna and flora or their ecological functions, or 2. death, permanent disabilities or other incurable serious illnesses to a population or they strip permanently the latter of their lands, territories or resources.

It is important that these acts are committed intentionally and with the knowledge of their widespread and systematic nature, with the intention where the perpetrator knew or should have known that there is a high probability that they will negatively affect the safety of the planet. It is clear from this definition of ecocide that the team led by Neyretto conceived the definition more broadly, including various acts negatively affecting the environment with a clearer explanation not only of merits, but also, for example, the fulfilment of the perpetrator´s intent. Falk´s proposal of the merits of ecocide focuses on activities mainly during armed conflict.

The proposal by Neyretto, like Falk's proposal, obliges the Contracting States to adopt the necessary legislative and other measures for the criminal liability of every person responsible for the ecocide, whether he commits ecocide; or orders, solicits or induces the commission of the ecocide; or aids, abets or otherwise assists in its commission or its attempted commission,

including providing the means for its commission, e.g. by falsifying documents; or in any way contributes to the commission or attempted commission of ecocide by a group of persons acting with a common purpose, or only the stage of attempting to commit an ecocide by taking all necessary steps that commences its execution by means of substantial step without achieving the objective for reasons independent of the persons' intention.

Measures taken by Contracting States pursuant to the draft of the Convention shall also ensure the criminal liability of legal persons for the ecocide committed for its benefit by any person holding a leading position, acting individually or as a part of the organ of the legal person as its representative, as an authority to take decisions on behalf of legal person or an authority to exercise control within the legal person concerned, without prejudice to the individual criminal liability of the natural person who have participated in the commission of crime of ecocide. The compliance enforcing mechanism with the provisions of the draft of the Convention include sanctions against natural and legal persons to be enshrined in the national law of each Contracting State. The State shall adopt effective, proportionate and dissuasive sanctions on the natural persons convicted and to ensure restoration of damage to environment and compensation for victims. In relation to the natural person, such sanctions may be imprisonment, the imposition of a monetary fine, a forfeiture of proceeds, property and asstes derived directly or indirectly from a crime. In the case of a legal person, the sanctions may consist of monetary fines, the orders of prohibitions as the dissolution of the legal person, the temporary or permanent closure of the premises or its establishments, the temporary or permanent suspension of all or part of activities in the course of which the crime of ecocide has been committed, incited or covered up, the withdrawal of licences, authorizations or concessions, or prohibition against receiving public subsidies and financing and entering into contracts with public administrations.

The draft of the Convention regulates also both mitigating and aggravating circumstances and various forms of compensation. In order to ensure compensation for damage, the Contracting States are obliged to take national measures for the confiscation of the proceeds of the crime derived from the ecocide or property in the amount corresponding to them, as well as property, equipment or other instrumentalities used in or destined to be used to commit the ecocide. States are therefore obliged to take measures to enable the identification, tracing, freezing or seizure of any abovementioned item for the purpose of eventual confiscation. As follows from the above, the

draft of the convention retains main responsibility for the prosecution of the ecocide on the state parties. State as a contracting party shall adopt necessary measures to establish its jurisdiction over the crime of ecocide in cases: (a) where the acts have been committed in the territory under the jurisdiction of the State concerned, or (b) where the result of the crime takes place in any territory under the jurisdiction of the State concerned, or (c) where the crime is committed on the board of a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the crime is committed, (d) where the crime is committed by nationals of that State, or (e) where the crime is committed by a legal person having its registered office or its principal activity or its main administrative center in its territory, or (f) where the crime is committed against nationals of that State Party and that that State considers it appropriate.

In the event of a conflict of jurisdiction of several states, they are obliged to cooperate in order to prosecute the ecocide. The State in whose territory the perpetrator or alleged perpetrator is situated shall ensure his presence for the purpose of prosecution or extradition. Where the States concerned do not have an extradition agreement concluded, the Convention itself should be regarded as a legal basis for extradition in relation to an ecocide which is not to be regarded as a political act. Although national prosecution is a priority, the body of the International Prosecutor for the Environment elected by the Assembly of State Parties for five years shall support national authorities. He should be competent to investigate and collect evidence and communicate with national prosecutors. The jurisdiction of the national authorities should be complemented by the competence of the International Criminal Court for the Environment which should be established by the State Parties.

In order to review the compliance with the provisions of the draft of the Convention, the Assembly of State Parties shall adopt arrangements of a non-confrontational, non-judicial and consultative nature, without prejudice to the dispute settlement procedure, but measures has to be applied before dispute settlement procedures. Disputes between State Parties concerning the interpretation or application of the Convention shall be settled by mutual negotiations, before the International Court of Justice or by arbitration.

The draft of the Convention against Ecocide prepared under the leadership of Neyretto is thus proposed in more detail, clearly defines the merits of the ecocide, criminal liability of natural and legal persons, forms of sanctions, the jurisdiction of states to prosecute the ecocide, and thus the main responsibility for attributing liability for the crime of the ecocide imposes on

national criminal authorities. And this fact may constitute the lack of this proposal, since experience based on the example of human rights protection or prosecuting crimes under international law shows that in order to achieve the desired objectives (to protect human rights or prosecute the most serious crimes) national mechanisms are not sufficient. But on the other hand, this lack can be balanced by the activities of the International Environment Prosecutor if established. This possible lack of this draft of the convention itself, as well as the fact that states have still not acceded to any convention governing the crime of the ecocide, push us to consider whether it will be more acceptable for states as well as for prosecuting the crime of the ecocide itself, if the ecocide will be included as a fifth crime under international law by the amendment of the Rome Statute.

5.3 Efforts to legally enshrine the ecocide as a crime under international law

Ecocide as a crime has gone through several forms of proposals to be legally enshrined since the 1970s. The most discussed form was the consideration of the classification of the ecocide as one of the forms of genocide crime. Already in 1933, Polish lawyer Lemkin[22] called upon the international community to adopt a ban on the destruction of a nation or ethnic group, by killing individual members (physical genocide – barbarism) and/or undermining its way of life (cultural genocide – vandalism). According to Gauger and others,[23] it is the ecocide that often causes cultural damage and destruction. Like genocide, the ecocide can be committed directly and indirectly, it can constitute the destruction of the territory, and it can also disrupt the way of life, ecologically and culturally. The final version of the legal regulation

[22] LEMKIN, R.: *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government- Proposal for Redress, Chapter IX: "Genocide" (1944)*. Online: https://www.academia.edu/5846019/Raphael_Lemkin_Axis_Rule_in_Occupied_Europe_Laws_of_Occupation_Analysis_of_Government_Proposals_for_Redress_Chapter_IX_Genocide_ (quoted 1 July 2022); Raphael Lemkin was a Polish lawyer who, after experience with Turkey's actions against Armenians and subsequently Nazi Germany initiated the use of the term genocide against the Jews and sought to adopt legislation prohibiting it. Closer to the work of Lemkin see e.g.: *Life of Raphael Lemkin*. Online: http://lemkinhouse.org/about-us/life-of-raphael-lemkin/ (quoted 1 July 2022).

[23] Processed by: *Ecocide is the missing 5th Crime Against Peace*. Report by A. GAUGER, M. P. RABATEL-FERNEL, L. KULBICKI, D. SHORT and P. HIGGINS. Online: https://www.academia.edu/1807111/Ecocide_is_the_missing_5th_Crime_Against_Peace (quoted 1 July 2022).

of genocide, whether the Convention on the Prevention and Punishment of the Crime of Genocide[24] or the Rome Statute of the International Criminal Court (Art. 6), does not contain an explicit reference to the ecocide. However, it would be possible to consider criminal liability for acts causing an ecocide, but only if there is connection between these acts and intention of perpetrator to destroy a national, ethnic, racial or religious group. However, we do incline to Bede's[25] view that many acts referred to as ecocide (e.g. surface oil extraction) do not have a genocidal impact on populations, so it is not appropriate to identify the ecocide with genocide in every case.

The international community has not been able to define the ecocide even as a separate crime under international law, and in the following sections we will examine the fact that international community has not been able to include the ecocide into the merits of other crimes under international law, as crimes against peace and war crimes, either.

5.3.1 Ecocide as a crime against peace or war crime

The crime of the ecocide has been already included under the crimes against peace already in the first considerations on the adoption of a more comprehensive legal regulation of criminal liability in times of war and in peace. Crimes against peace are currently regulated by the Rome Statute. The predecessor of the Rome Statute was the various drafts of the Code of Crimes against the Peace and Security of Mankind (hereinafter referred to as the "Code").[26] The draft of the Code from 1993 included the crime of ecocide in merits of the crimes against peace with only with only a few states objecting to its inclusion as crime.[27]

However, despite wide acceptance of the inclusion of the crime of ecocide among crimes against peace, it was removed from the Code without fur-

[24] Decree of the Minister of Foreign Affairs No. 32/1955 Coll. on the Convention on the Prevention and Punishment of Crime of Genocide (*Vyhláška ministra zahraničných vecí č. 32/1955 Zb. o Dohovore o zabránení a trestaní zločinu genocídia*).

[25] *Note No. 8*, p. 102.

[26] However, the final proposal does not regulate the crime of the ecocide. See: *Draft Code of Crimes Against the Peace and Security of Mankind*. Online: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf (quoted 1 July 2022).

[27] More closely: *Yearbook of the International Law Commission 1993, Volume II, Part One, Documents of the forty-fifth session*. Online: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p1.pdf (quoted 1 July 2022).

ther justification.[28] Tomuschat[29] attributes this failure to proponents of the use of nuclear weapons, as the final text of the Code is so depressed that its conditions of applicability will almost never be fulfilled, even in the event of the most heinous disaster as a result of the conscious action of persons fully aware of the fatal consequences of their decisions.

The modified form of environmental crime appears only in the final version of the Rome Statute, but no longer in the form of a crime against peace, but as a war crime. Art. 8 par. 2 (b) (iv) defines as one of war crimes "*intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment*[30] *which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*" This is therefore an act committed exclusively at the time of the armed conflict, which merits requires cumulative fulfillment of a number of conditions, due to which it is almost impossible to fulfill it.

It represents a modified version of the crime against the environment, which is contained in the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (hereinafter referred to as "Convention").[31] Although it is wider, it is also applicable to acts committed in peacetime, but without the possibility of prosecution before an in-

[28] As Doudou Thiam, Special Rapporteur of the United Nations Commission on International Law, points out in the 13th report on the draft Code of Crimes against Peace and Security of Humanity, the proposed articles against which states had strong reservations included Art. 26- Intentional and gross environmental damage (A/CN.4/466). See also *Note No. 2* and JANKUV, J.: Trestanie zločinov poškodzujúcich životné prostredie v kontexte judikatúry medzinárodných trestných súdov. In: LANTAJOVÁ, D., BLAŠKOVIČ, K. (eds.*): Judikatúra medzinárodných súdnych a kvázi-súdnych orgánov so zameraním na medzinárodné trestné právo a jej interakcia s vnútroštátnym právnym poriadkom*. Trnava: Trnavská univerzita, Právnická fakulta, 2013, p. 102 et seq.

[29] *Note No. 8,* p. 100.

[30] Slovak translation of the Rome Statute contained in the electronic collection of laws of the Ministry of Justice of Slovak republic works with the term *natural environment (prírodné prostredie)*, but the author is rather inclined to the established terminology of translation of the English term "natural environment" in the form of "*životné prostredie*".

[31] Decree of the Minister of Foreign Affairs No. 77/1980 Coll. on the Convention on the Prohibition of Military or any other hostile use of means of changing the environment (*Vyhláška ministra zahraničných vecí č. 77/1980 Zb. o Dohovore o zákaze vojenského alebo akéhokoľvek iného nepriateľského použitia prostriedkov meniacich životné prostredie*). Art. 1 obliges the Contracting States *not to resort to the military or any other hostile use of means of changing the environment which have extensive, long-term* ***or*** *serious consequences* ... Thus, these are possible forms of breach of the obligation, whereas the Rome Statute, by means of ‚a' instead of ‚or', very closely defines the conditions for committing a crime and

ternational judicial body such as the International Criminal Court. The enforceability is therefore linked only to the mechanism provided for in the Convention. Enforcement mechanism of the Convention is based on the implementation of an obligation by a Contracting State *to take any measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control* (Art. IV of the Convention). The national enforcement mechanism is thereore a key for examining compliance with that provision. But there is also international enforcement mechanism by complaint to the United Nations Security Council about a breach of an obligation under the Convention by one of the Contracting Parties. The United Nations Security Council shall inform the Contracting States to the Convention about the results of its investigation. If the United Nations Security Council decides that the Contracting State concerned has been, or is likely to be, affected by a breach of the Convention, other Contracting Parties are subsequently obliged to provide assistance to a Contracting State concerned at its request (Art. V par. 3 of the Convention).

5.3.2 Current efforts to amend the Rome Statute with the crime of Ecocide

First proposals of the crime of ecocide linked to acts committed in time of war should be revised as the acts falling under the idea of ecocide are now largely linked to economically motivated environmental destruction (ocean pollution due to oil tanker accidents, deforestation of forests for the production of palm oil, etc.) in time of peace. The current efforts to legally regulate the ecocide thus respect this switch and these efforts omit its link to the state of war from the definition of ecocide. One of these efforts is the proposal[32] to make an amendment to the Rome Statute with the crime of ecocide, presented by the Panel of Independent Experts[33] within the Stop Ecocide Foundation in June 2021. It aims to extend Article 5 (1) of the Rome Statute to

thus makes it difficult to prosecute in acts grossly and negatively affecting the environment. Currently, the Convention has 78 Contracting States.

[32] *Independent Expert Panel for the Legal Definition of Ecocide: commentary and core text, June 2021*. Online: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf (quoted 1 July 2022).

[33] For experts represented in the Panel, see: *Legal Definition Of Ecocide: An historic moment – June 2021*. Online: https://www.stopecocide.earth/legal-definition (quoted 1 July 2022).

include the fifth crime of the ecocide and to amend it with Article 8 ter defining the ecocide as an *unlawful or wanton*[34] *acts with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts*. The panel of experts clarifies the different terms used to define the ecocide, most of which are used in the common sense of criminal law or environmental law. As an exception is the term *"environment" (or natural environment*), the definition of which is still missing in international law. According to the panel, it is essential that the term "environment" includes the Earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space, which is a very interesting extension of the perception of the environment with regard to the increasing problem of space debris e.g.

The proposal has already been completed by Giovanni Chiarini,[35] but he does not complement the definition proposed by the Panel, but he rather deals with the clarification of the proposal and the ecocide itself, as well as the procedural steps of criminal prosecution of the ecocide.

However, in order to amend the Rome Statute, it is necessary, inter alia, that the amendment should be adopted by 2/3 of the majority of the Contracting States, currently 82 of all 123,[36] which may not be the easiest, despite the various supporting statements made by the Pope Francis or countries which have already adopted national rules of criminal law for the prosecution of the ecocide.[37] In the nearest future, the proposal of amendment may be submitted at the meeting of the Assembly of the Parties in December 2022.[38] However, although the inclusion of the crime of an ecocide in crimes under international law under the Rome Statute may have its ups and downs, mainly with regard to its definition, the mere legal enshrinment can have a strong preventive effect and can protect the environment.

[34] The English term "wanton" should be translated as "arbitrariness (svojvoľnosť)", however, according to the Panel of Experts Draft it means irresponsible recklessness towards harm, which would be clearly disproportionate in relation to the expected social and economic benefits. See in more detail the draft Art. 8 ter paragraph 2 (a).

[35] *Note No. 9*.

[36] *For the process of amendment of the Rome Statute, see: Making Ecocide a Crime*. Online: https://www.stopecocide.earth/making-ecocide-a-crime (quoted 1 July 2022).

[37] For more: DAWES, J.: *It is time to make ecocide an international crime.* Online: https://www.openglobalrights.org/it-is-time-to-make-ecocide-an-international-crime/ (quoted 1 July 2022).

[38] The 21st meeting of the Assembly of the Parties is scheduled for 5.–10.12.2022. *Twenty-first session of the Assembly of States Parties*. Online: https://asp.icc-cpi.int/sessions/documentation/21st-Session (quoted 1 July 2022).

Opponents of classifying the ecocide as a crime under international law state the argument that such inclusion could trivialize the "core crimes" under international law – crimes against peace, war crimes, crimes against humanity and the crime of genocide.[39] According to the others,[40] protection of the environment would be increased just by the extension of the scope of Art. 8 par. 2 (b) (iv) of the Rome Statute also to conflicts not having an international character. But the ecocide is almost existentional issue for the humanity as such whether acts of ecocide affect small goup of people or animals, or these acts cause negative environmental changes for the whole planet. As such, the ecocide should be the part of the "core crimes" under international law.

5.4 European Union fight for the Ecocide as a crime

Climate change negatively affects the whole planet, therefore also the states of the European Union. In order to become first climate neutral continent in the world, it settled climate targets by European Green Deal.[41] Actions of the European Union to fullfil European Green Deal targets are devided to eight fields (climate, environment and oceans, energy, transport, agriculture, finance and regional development, industry, research and innovation). Iniciatives in every field gradually becomes law,[42] but there is yet a lot to do. Althought the European Green Deal does not cover ecocide as a crime, European Union repeatedly supports the international efforts to recognize ecocide as an international crime under the Rome Statute.[43] Following the

[39] GREENE, A.: T*he Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?* Online: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1814&context=elr (quoted 1 July 2022).

[40] See e.g. JANKUV, J.: Trestanie zločinov poškodzujúcich životné prostredie v kontexte judikatúry medzinárodných trestných súdov. LANTAJOVÁ, D., BLAŠKOVIČ, K. (eds.): *Judikatúra medzinárodných súdnych a kvázi-súdnych orgánov so zameraním na medzinárodné trestné právo a jej interakcia s vnútroštátnym právnym poriadkom*. Trnava: Trnavská univerzita, Právnická fakulta, 2013, p. 104.

[41] *A European Green Deal*. Online: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#thematicareas (quoted 1 July 2022).

[42] For example see: *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')*, 30 June 2021, OJ L 243, p. 1–17.

[43] *European Parliament resolution of 17 February 2022 on human rights and democracy in the world and the European Union's policy on the matter — annual report 2021 (2021/2181 (INI))*. Online: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0041_EN.html (quoted 1 July 2022); *Report on the liability of companies for environmental dam-*

targets of European Green Deal, in December 2021 European Commission published its proposal[44] for a directive on the protection of the environment through criminal law replacing the Environmental Crime Directive[45] from 2008, with the same objective to support the protection of the environment by laying down criminal offences and related sanctions for the most harmful and serious environmental crimes. Revision deals with the purpose to eliminate low sanctions level, lack of cooperation between authorities, considerable enforcement gaps, etc., and to tackle the goals of the European Green Deal as climate crisis, environmental degradation, pollution and loss of nature. This revised directive sets minimum standards to be adopted by each Member State, which remains free to adopt or to maintain more stringent rules and sanctions. But yet again, it does not recognize the crime of ecocide.[46]

Following activities of the European Union which relies on national legislation (although unified by minimum standards established by the above mentioned Directive), we already have a proof that national legislation is a powerful tool for fighting with the negative effects of the climate change. On 29 April, 2021, the German Constitutional Court declared that the German Climate Law on greenhouse gas emission reduction before 2030 violated the fundamental rights of the young generations (some of which started this case against the German government).[47] This case confirms that climate litigation

age (2020/2027 (INI)). Committee on Legal Affair. Online: https://www.europarl.europa.eu/doceo/document/A-9-2021-0112_EN.pdf (quoted 1 July 2022).

[44] *Proposal for a Directive of The European Parliament And of The Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC*. Online: https://ec.europa.eu/info/sites/default/files/1_1_179760_prop_dir_env_en.pdf (quoted 1 July 2022).

[45] *Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law*, OJ L 328.

[46] *The European Commission proposes new directive to crack down on environmental crime.* Online: https://sustainablefutures.linklaters.com/post/102hgfo/european-commission-proposes-new-directive-to-crack-down-on-environmental-crime (quoted 1 July 2022).

[47] *GreenReads: The EU's Fitfor55 package — How green are the Recovery Plans? – Ecocide — Climate Court case in Germany*. Online: https://www.etui.org/news/greenreads-eus-fit-for55-package-how-green-are-recovery-plans-ecocide-climate-court-case (quoted 1 July 2022); Among the key findings we can find:" the fundamental right to life and physical integrity in the constitution also includes a duty of the state to actively protect life and health from the dangers of climate change," as well as "the provision on environmental protection in Article 20a of the constitution imposes a constitutional duty on the state to achieve climate neutrality. This duty to protect the climate is justiciable and limits political discretion". See: STABBING, R., SINA, P.: *The German Federal Constitutional Court's*

is increasingly going to influence governments' policies to deal with the climate emergency. As a positive example is also a France, with its Climate and Resilience Act from 2021 providing for up to 10 years on jail for serious and lasting damage to health, flora, fauna or quality of the air, soil or water.[48] This Act is reffered as French Ecocide law.[49] This confirms that legislative steps of individual state could be more effective and faster than unconsistent steps of states grouped in international organization.

Conclusion

The ecocide as a crime under international law based on amendment of the Rome Statute may, according to Bilott,[50] help to slow down the progress of climate change. The very existence of a crime and the establishment of punishment for its commission are generally perceived as a deterrent mechanism. Up to now, several definitions of the ecocide have been proposed, all of which are aimed at one goal, protecting the environment from its irreversible destruction. However, when formulating the merits of an ecocide, it is impossible to expect the adoption of a definition that would contain all possible forms of environmental destruction. Even more in view of the fact that all forms may not even be known at present.

However, in the case of an ecocide, it is problematic to prove the intention to commit an ecocide (similar to the genocide). In particular it may be due to the fact that gross environmental destruction often occurs gradually over several years, as well as a consequence of the activities permitted by international law. Moreover, environmetnal destruction could be directed towards fulfilment of a socially beneficial goal, such as mining of a coal or other mineral resources, the use of chemicals in the cultivation of agricultural crops or the use of nuclear fuel to achieve the well-being of humanity. However, in the history of international law, we already have at least one example where states have shown reluctance to commit themselves to responsibility for damages linked to the activities within their jurisdiction. Despite

decision on the Climate Change Act. Ecologic Institute, Berlin, 2021. Online: https://www.ecologic.eu/18104(quoted 1 July 2022).

[48] *Journal officiel électronique authentifié n° 0196 du 24/08/2021*. Online: https://www.legifrance.gouv.fr/download/pdf?id=x7Gc7Ys-Z3hzgxO5KgI0zSu1fmt64dDetDQxhvJZN-Mc= (quoted 1 July 2022).

[49] See: *France writes ecocide into law, in 2 ways*. Online: https://www.stopecocide.earth/press-releases-summary/france-writes-ecocide-into-law-in-two-ways (quoted 1 July 2022).

[50] *Note No. 7.*

the considerable work carried out by the United Nations Commission on International Law in the field of codification and progressive development on the rules of state responsibility for international wrongful acts or liability for damages caused by activities permitted by international law (often negatively affecting the environment due to the cross-border damage), states have not been able to proceed to the adoption of binding conventions in these areas.[51] A light exception in this respect is the Convention on International Liability for Damage Caused by Space Objects.[52] An understandable reason may be the fact that these activities are carried out not by the states themselves, but rather by private entrepreneurs. Consequently, states have no interest in committing themselves to responsibility for damage connected to activities from which profits belong to private companies. However, at present it is not rare that such activities are carried out with state support or with the financial involvement of government officials. It should therefore be added that the intention in the case of an ecocide should not only be linked to the intention to cause the damage to the environment itself, but also to the intention of achieving an economic advantage due to which environmental damage occurred or should have occurred (taking into account the stage of the attempted crime).

However, as we are now seeing states shall postpone the achievement of climate targets, which individual states or international organisations have seen as crucial within the fight against climate change. But as a result of the military conflict in Ukraine and economic sanctions against Russia, states are returning to use their own fossil fuels or nuclear energy for safety reasons and with the purpose to fulfill climate targets they will need to develop more sources for clean energy.

If states fail to agree on amendment of an ecocide as the fifth crime under the Rome Statute, the focus must be on preventing and discouraging to maintain the activities that destroy our ecosystems and cause irreversible cli-

[51] See: POŠIVÁKOVÁ, Ľ.: Zodpovednosť štátov v medzinárodnom práve. In: *STUDIA IURIDICA Cassoviensia*, roč. 3, 2015, No. 1, p. 100–127. Online: http://sic.pravo.upjs.sk/files/9_posivakova_-_zodpovednost_statov.pdf (quoted 1 July 2022).

[52] Decree of the Minister of Foreign Affairs No. 58/1977 Coll. on the Convention on International Liability for Damage Caused by Space Objects (*Vyhláška ministra zahraničných vecí č. 58/1977 Zb. o Dohovore o medzinárodnej zodpovednosti za škody spôsobené kozmickými objektmi*).

mate change.[53] In this respect, as a mechanism to protect the environment against ecocide activities could be applied the mechanism for protection of human rights,[54] as a human rights are often violated as a result of environmental destruction. An example can be the right to life, or right to respect of private and family life, through which the European Court of Human Rights develops the right to a healthy environment.[55]

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[55] See e.g. ELBERT, Ľ.: Úlohy a prínos európskych regionálnych súdov v súčasnej Európe (so zameraním na ESĽP). In: *Nová Európa – výzvy a očakávania : Výzvy pre medzinárodnoprávnu a európsku ochranu ľudských práv v podmienkach novej Európy*. Bratislava: Wolters Kluwer, 2016, p. 124–137.

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44.) *The European Commission proposes new directive to crack down on environmental crime.* Online: https://sustainablefutures.linklaters.com/post/102hgfo/european-commission-proposes-new-directive-to-crack-down-on-environmental-crime (quoted 1 July 2022).

45.) *Twenty-first session of the Assembly of States Parties*. Online: https://asp.icc-cpi.int/sessions/documentation/21st-Session (quoted 1 July 2022).

46.) WOJSYK, J.: *Ecocide – the genocide of the 21st century? Eastern European perspective*. Online: https://www.cirsd.org/en/expert-analysis/ecocide-%E2%80%93-the-genocide-of-the-21st-century-eastern-european-perspective (quoted 1 July 2022).

47.) *Yearbook of the International Law Commission 1993, Volume II, Part One, Documents of the forty-fifth session*. Online: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p1.pdf (quoted 1 July 2022).

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6 CROSSBORDER ENVIRONMENTAL DAMAGE: WHAT IS THE APPLICABLE LAW?

Ľubica Gregová Širicová

Abstract

The attention of the author is focused on the rules that determine the applicable law to civil liability for cross-border environmental damage from the perspective of the EU Member State courts. The relationship between international treaties and the Rome II Regulation is examined. Article 7 of the Rome II Regulation represents a conflict-of-law rule that will be applied to most situations and the author examines legislative development, objectives, material scope and functioning of the Article as well as its relations to other selected Articles in the Rome II Regulation. Moreover, attention is paid to the Proposal for a Directive on Corporate Sustainability Due Diligence that is closely related to the cross-border environmental damage.[1]

Introduction

Various types of environmental damage can have cross-border effect. The consecutive attempts to remedy the situation through civil liability are inherently more difficult due to the necessity to apply the rules of Private International Law. In the case of a non-contractual obligation resulting from environmental damage involving a foreign element, the court will need to determine the applicable law.[2] This paper is going to tackle this question from the point of view of courts situated in the EU member states. In most cases, the applicable law shall be determined pursuant to Article 7 of the

[1] The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)".

[2] In the first place, the court will need to determine the international jurisdiction, however, due to limited space, this paper is not going to deal with this question. See BULLA, M.: Medzinárodná právomoc súdov vo veciach poškodenia životného prostredia. In: JANKUV, J. (ed.): *Aktuálne otázky vývoja a súčasnej podoby medzinárodného a európskeho práva životného prostredia na právny poriadok Slovenskej republiky a Českej republiky. Zborník príspevkov z medzinárodnej vedeckej online konferencie. 7.–8. november 2019, Trnava, Slovenská republika*. Typi Universitatis Tyrnaviensis, 2020.

Rome II Regulation.[3] Exceptions are twofold. Firstly, non-contractual obligations arising from a nuclear event are expressly excluded from the material scope of the Rome II Regulation. Secondly, there will be situations which fall under international conventions with priority over the Rome II Regulation. Moreover, there is another exception on the horizon of the European legislation: a civil liability regime drafted in the Proposal for a Directive on Corporate Sustainability Due Diligence.[4] According to its explanatory memorandum, the behaviour of companies across all sectors of the economy is key to succeed in the Union's transition to a climate-neutral and green economy[5] in line with the European Green Deal[6] and in delivering on the UN Sustainable Development Goals, including on its human rights- and environment-related objectives. The author would like to pay most attention to Article 7 of the Rome II Regulation. Lastly, the paper will try to examine whether the solution for environmental damage in the proposed Directive is in coherence with the instruments already existing in the European Private International Law.

6.1 Crossborder Environmental Damage in International Treaties

In the international legal sphere the environmental problem has proved fertile ground for the drafting of legislation on uniform substantive law that is characterised by its diversity.[7] In the first place, the attention will be paid to international treaties governing obligations that do not fall under the scope of the Rome II Regulation. Afterwards, the focus will be on international

[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

[4] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

[5] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[6] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Region "The European Green Deal" (COM/2019/640 final).

[7] FACH GOMEZ, K.: *Law Applicable to Cross-Border Environmental Damage: From the European Autonomous Systems to Rome II* (September 11, 2010), p. 2. Available at SSRN: https://ssrn.com/abstract=1675549 (quoted 1 July 2022).

treaties regulating obligations that are covered by the Rome II Regulation, however those treaties take precedence over the Regulation.

6.1.1 Non-contractual obligations arising from a nuclear event

According to the rule in Article 1 (2) f) of the Rome II Regulation, the Regulation shall not apply to non-contractual obligations arising from a nuclear event. This type of environmental damage is subject to extensive unification. The Paris Convention on Third Party Liability in the Field of Nuclear Energy was adopted in 1960 within the Organization for Economic Cooperation and Development. The Convention was supplemented by the Protocols of 1964, 1982, and 2004. At the United Nations, the Vienna Convention on Civil Liability for Nuclear Damage was signed in 1963 and supplemented by the Protocol of 1997. Given that individual States are not parties to both conventions at the same time but are either a party to the Paris Convention or are a party to the Vienna Convention, a Joint Protocol on the Application of the Vienna Convention and the Paris Convention has been drawn up to bridge conflict situations.[8]

6.1.2 International treaties with precedence over the Rome II Regulation

The issue of cross-border damage to the environment is subject to several international treaties.[9] Some of these conventions also deal with civil liability. There was an effort in the Council of Europe to prepare a comprehensive Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment,[10] however, so far there have only been 9 signatures and no ratifications/accessions yet. Similarly, there are yet not enough ratifications for the UN Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal.[11] The conventions that are in force concern predominantly the marine environment. They are listed in Annex IV to Directive 2004/35/CE

[8] See more details in NOVOTNÁ, M., HANDRLICA, J.: *Zodpovednosť za jadrové škody*. VEDA, 2011.

[9] For their overview see e.g., BOYLE, A., REDGEWELL, C.: *Birnie, Boyle, and Redgwell's International Law and the Environment. 4th Edition*. Oxford University Press, 2021; JANKUV, J.: *Environmentalizácia medzinárodného práva verejného a jej vplyv na právo Európskej únie a právny poriadok Slovenskej republiky*. Praha: Leges, 2021.

[10] Adopted by the Committee of Ministers on 8 March 1993.

[11] Basel, 10 December 1999.

of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage:[12]

(a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
(b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
(c) the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;
(d) the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
(e) the Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

Although it is consistent in legal literature that conventions unifying substantive law take precedence over the Rome II Regulation, the view on the reason for this priority is not united. The regulation itself addresses only its relationship with conventions containing conflict-of-law rules, namely in Article 28 (1): "This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations." The conventions listed above do not contain conflict-of-law norms; they establish substantive (direct) norms. None of them have been notified by the Member States pursuant to Article 29 (1) of Rome II as a convention falling under Article 28 (1) of Rome II.[13] In this respect, we can observe the inconsistent approach of the Member States. When they notified conventions that take precedence over Rome I Regulation,[14] they included both the conventions containing

[12] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p. 56–75.

[13] Notifications under Article 29(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ C 343, 17.12.2010, p. 7–11.

[14] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

conflict-of-law rules as well as conventions unifying substantive rules.[15] An example of a convention containing conflict-of-law rules for environmental damage (and notified by the Member States) is the Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden (Stockholm 19 February 1974).

The problem of the primacy of conventions containing substantive (direct) rules can be solved by reference to the theory of Private International Law, which shows that direct norms generally take precedence over conflict-of-law rules.[16] Therefore, it is always necessary to examine whether direct norms are applied to a given relationship. If the prerequisites for their application (*ratione materiae, ratione temporis*, etc.) are met, they will apply preferably over the Rome II Regulation. However, other authors infer the priority of such conventions from the fact that the rules contained therein are of the nature of overriding mandatory provisions pursuant to Article 16 of Rome II.[17] According to this article, nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

6.2 Cross-border Environmental Damage in Rome II Regulation

The particularities of the environmental protection justified the adoption of Article 7 as *lex specialis* conflict-of-law rule against the general rule in Arti-

[15] Notifications under Article 26(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), OJ C 343, 17.12.2010, p. 3–6.

[16] In Slovakia and in the Czech Republic: Kučera, Pauknerová in KUČERA, Z. PAUKNEROVÁ, M. RŮŽIČKA, K. a kolektiv: *Mezinárodní právo soukromé*. 8. vyd. Brno-Plzeň: nakladatelství Čeněk, 2015, p. 297; Rozehnalová in ROZEHNALOVÁ, N., DRLIČKOVÁ, K., KYSELOVSKÁ, T., VALDHANS, J.: *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 165-166; also Csach, Gregová Širicová in CSACH, K., GREGOVÁ ŠIRICOVÁ, Ľ., JÚDOVÁ, E.: *Úvod do štúdia medzinárodného práva súkromného a procesného*. 2. vyd. Bratislava: Wolters Kluwer, 2018, p. 39, see also KAPITÁN, Z.: Má vždy metoda přímá přednost před metodou kolizní? Vztah kolizního práva a Vídeňské úmluvy OSN o smlouvách o mezinárodní koupi zboží. In: *Acta Universitatis Carolinae Iuridica*, 1/2008 – Pocta Zdeňku Kučerovi k 80. narozeninám. Praha: Univerzita Karlova, 2008, p. 61–67.

[17] DICKINSON, A.: *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford University Press, 2008, p. 443.

cle 4 of the Rome II Regulation. The structure of the article acknowledges the fact that non-contractual obligation resulting from damage to the environment can take the form of a transboundary delict where the damage and the act that caused the damage are localized in different countries. A solution has been developed whereby the operator is not incentivised to intentionally settle near the borders of a country with a lower level of environmental protection with a vision of releasing emissions into that State. Indeed, the applicable law, within the meaning of Article 7, may not only be the law of the place of direct damage, but also the law of the place where the event which caused the damage occurred, depending on the will of the injured party. The essence of the concept is a specific form of autonomy of will in favor of the injured person. The application of Article 17 of the Rome II Regulation (Rules of Safety and Conduct) is of particular importance for distance delicts damaging the environment. Where appropriate, the court shall take into account the fact that the person claimed to be liable has complied with the rules applicable in the country where the event giving rise to the liability occurred.

The sequence of steps to take when determining the law applicable to a non-contractual obligation resulting from environmental damage can be schematically indicated as follows:

Is there agreement of the Parties on the choice of applicable law pursuant to Article 14? If there is no choice, Article 7 shall apply.

According to Article 7, the person seeking compensation may base his claim on the law of the country in whose territory the fact which caused the damage occurred. If this choice has not been made, the applicable law shall be determined on the basis of Article 4 (1).

According to Article 4 (1), the law of the country in which the damage occurred is applicable, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

6.2.1 Legislative development

To illuminate the Commission's intention in shaping conflict-of-laws rules for environmental damage, the following passages of the Proposal for a Rome II Regulation of 2003 can be pointed out: "European or even international harmonisation is particularly important here as so many environmental disasters have an international dimension. But the instruments adopted so far deal primarily with questions of substantive law or international jurisdiction

rather than with harmonisation of the conflict rules. And they address only selected types of cross-border pollution. In spite of this gradual approximation of the substantive law, not only in the Community, major differences subsist – for example in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation. The question of the applicable law has thus lost none of its importance. Analysis of the current conflict rules shows that the solutions vary widely. The lex fori and the law of the place where the dangerous activity is exercised play a certain role, particularly in international Conventions, but the most commonly applied solution is the law of the place where the loss is sustained (France, United Kingdom, Netherlands, Spain, Japan, Switzerland, Romania, Turkey, Quebec) or one of the variants of the principle of the law that is most favourable to the victim (Germany, Austria, Italy, Czech Republic, Yugoslavia, Estonia, Turkey, Nordic Convention of 1974 on the protection of the environment, Convention between Germany and Austria of 19 December 1967 concerning nuisances generated by the operation of Salzburg airport in Germany). The Hague Conference has also put an international convention on cross-border environmental damage on its work programme, and preparatory work seems to be moving towards a major role for the place where the damage is sustained, though the merits of the principle of favouring the victim are acknowledged."[18]

The wording of the conflict-of-law rules for environmental damage in the 2003 Proposal for Rome II Regulation corresponds in principle to their current form in Article 7 of the Rome II Regulation. The proposed option of choosing the applicable law in favour of the injured party was at first met with a mixed reaction among the Member States, when some states supported it, others proposed its deletion or expressed concerns about the difficulty of its application. Although the rule was rejected at first reading in the European Parliament, the subsequent discussion resulted in its acceptance at second reading. Parliament further proposed that the definition of 'environmental damage' should be included in the recital of the Rome II Regulation by reference to Article 2 of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. That proposal

[18] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") (presented by the Commission), Brussels, 22.7.2003, COM(2003) 427 final 2003/0168 (COD), p. 19.

has not been approved by the Council. The compromise results in an independent definition contained in recital 24 to the Rome II Regulation (see below).

6.2.2 Objectives of the conflict-of-law rule in Article 7

The collision standard is based on the so-called ubiquity principle (Ubiquitätsprinzip).[19] The primary solution is to apply the general rule in Article 4 (1) of Rome II (the law of the place where the damage occurred). However, the person seeking compensation is also given the opportunity to divert from that law and base its claim on the law of the country in which the event giving rise to the damage occurred. Thus, the person seeking compensation has a preferential status. From the two alternatives listed, this person may choose a legal order that is better suited to his/her/its interests. At the same time, that standard is intended to achieve the objective of environmental protection contained in primary law (ex-Article 174 TEC, present Article 191 TFEU).

The abovementioned objectives of the European legislature are referred to in recital 25 to the Rome II Regulation: "Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised."

The concept of conflict-of-law rules is explained by the Commission in the 2003 Proposal for the Rome II Regulation as follows: "The basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental

[19] von BAR, CH., MANKOWSKI, P.: *Internationales Privatrecht Band II: Besonderer Teil*, 2. Auflage. C. H. Beck, 2019, p. 361.

protection. But the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union's more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the polluter pays principle."[20]

6.2.3 Material scope of the conflict-of-law rule in Article 7

As regards the scope of the conflict-of-law rule in Article 7, it includes a non-contractual obligation arising out of "environmental damage or damage sustained by persons or property as a result of such damage". Thus, in addition to the damage to the environment itself, Article 7 also covers cases where damage to the environment has resulted in bodily injury or damage to property. The term "environmental damage" is defined in recital 24 to the Rome II Regulation and should be understood as "meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms". This list is exemplary, not exhaustive, and thus allows subordination of other natural resources.[21] As already mentioned above, the environmental damage caused by a nuclear incident will not fall under the concept of "environmental damage".

The definition in the Rome II Regulation can be compared with how environmental damage is defined in Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with

[20] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") (presented by the Commission), Brussels, 22.7.2003, COM(2003) 427 final 2003/0168 (COD), pp. 19–20.

[21] Von Plehwe in HÜßTEGE, R., MANSEL, H.-P. (hrsg.): *NomosKommentar BGB Band 6 – Rom-Verordnungen zum Internationalen Privatrecht.* 3rd Edition. Baden Baden: Nomos, 2019, p. 422.

regard to the prevention and remedying of environmental damage. The directive itself is focused on administrative and other public law measures and does not address issues of private international law. The definition of "environmental damage" in Article 2 of the Directive is more detailed compared to the Regulation: it specifies protected targets (damage to protected species and natural habitats, water damage, and land damage), each of which is associated with the requirement of serious adverse effects or serious risk of adverse effects and also introduces various exceptions. The term "damage" means a measurable adverse change in a natural resource or measurable impairment of a natural resource service that may occur directly or indirectly.

Jurisprudence differs as to the meaning of these concepts for Article 7 of the Rome II Regulation. *Tichý* states that recital 24 of the Rome II Regulation defines environmental damage on the basis of Article 2 of the Directive, or that the definition in the Rome II Regulation corresponds to the definition contained in Article 2 of the Directive.[22] *Dickinson* considers the definition in the Directive to be more detailed and narrower.[23] In *Bogdan*'s view, the definition in the Rome II Regulation appears to roughly correspond to the definition in the Directive. Unlike the Directive, the definition in the Regulation does not expressly require an adverse change to be significant or measurable, but the concept of environmental damage seems to implicitly require damage to reach a certain seriousness, either in terms of quantity (such as the number of people affected or square kilometres) or in terms of intensity (such as the severity of the problems caused or potentially imminent).[24] The absence of a condition of the severity of damage in the Rome II Regulation is pointed out by *von Plehwe*, too, while the author further states that liability does not depend on whether the damage was foreseeable for the operator.[25] The interpretation of the term "environmental damage" can be enlightened by reference to the Rome II legislative history. As it has been stated above, the European Parliament had originally proposed that the defi-

[22] TICHÝ, L.: *Nařízení č. 864/2007 o právu rozhodném pro mimosmluvní závazkové vztahy (Řím II). Komentář*. Praha: C. H. Beck, 2018, pp. 110, 111.

[23] DICKINSON, A.: *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford University Press, 2008, p. 434.

[24] BOGDAN, M.: The Treatment of Environmental Damage in Regulation Rome II. In: AHERN, J., BINCHY, W. (eds.): *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*. The Hague, 2009, p. 224.

[25] von Plehwe in HÜßTEGE, R., MANSEL, H.-P. (hrsg.): *NomosKommentar BGB Band 6 – Rom-Verordnungen zum Internationalen Privatrecht*. 3rd Edition. Baden Baden: Nomos, 2019, p. 422.

nition of 'environmental damage' should be included in the Regulation by reference to Article 2 of the Directive, however, that proposal has not been approved by the Council. The definition in the Regulation, therefore, needs to be seen as a concept separate from the Directive.

6.2.4 Option to unilaterally choose the applicable law

Article 7 confers special entitlement to the "person seeking compensation for damage". This term is broader than the notion of "injured party" and should include situations where compensation is enforced by a person different from the injured party (e.g. an insurance company). In essence, the person seeking compensation has the possibility to choose the applicable law from two possible alternatives: the law of the place of damage (*lex loci damni*) or the law of the place of the act giving rise to damage (*lex loci delicti commissi*), regardless of the opinion of the person held liable for the damage, who logically does not have such option of choice. While the classical term "choice of applicable law" is an agreement between the parties on applicable law (e.g. Article 14 of the Rome II Regulation), the choice of applicable law within the meaning of Article 7 is a unilateral decision of the injured party (von Bar and Mankowski use the term "unilateral choice"[26]).

It is for the person seeking damages to consider whether it is more advantageous for him to choose the *lex loci delicti commissi* compared to the legal order determined under Article 4 (1) of Rome II (*lex loci damni*). In its 2003 Proposal for a Rome II Regulation on the unilateral selection of applicable law, the Commission states: "Article 7 accordingly allows the victim to make his claim on the basis of the law of the country in which the event giving rise to the damage occurred. It will therefore be for the victim rather than the court to determine the law that is most favourable to him."[27]

There has been some critique as to the unpredictability of the applicable law. *Oprea* argues that provisions related to the predictability of the harm would be of nature to bring a certain dose of equity: if the polluter foresaw or should have foreseen that the consequences of its actions could cause harm in a particular state, it should not be allowed to challenge the application of the more severe law of the respective state; on the other hand, if the pollut-

[26] von BAR, CH., MANKOWSKI, P.: *Internationales Privatrecht Band II: Besonderer Teil*, 2. Auflage. C. H. Beck, 2019, p. 361.

[27] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") (presented by the Commission), Brussels, 22.7.2003, COM(2003) 427 final 2003/0168 (COD), p. 20.

er objectively did not foresee the occurrence of the harm in the respective state, the judges should be able to take into consideration this aspect when the assessment is made with respect to the polluter's liability.[28] Although very interesting, this idea has not been further elaborated in the Study carried out for the EU Commission by the British Institute of International and Comparative Law (BIICL) in consortium with Civic Consulting to support the preparation of a report on the application of Rome II Regulation.[29] The study concluded, that Article 7 has mainly been commented on as adequately ensuring that the private interests of the victims coincide with the highest level of environmental protection, all the while limiting the incentive for strategic implantation of polluting companies at the border of jurisdictions with laxer rules.[30]

Recital 25 to the Regulation refers to the question at which point in the course of the proceedings (especially until when) the person seeking compensation may exercise unilateral selection of the applicable law: "The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised." On this point, the Commission notes in the 2003 Proposal for the Rome II Regulation: "The question of the stage in proceedings at which the victim must exercise his option is a question for the procedural law of the forum, each Member State having its own rules to determine the moment from which it is no longer possible to file new claims."[31]

Dickinson submits that if the person seeking compensation chooses the law of the country where the event giving rise to the damage occurred, that law shall fully replace the otherwise applicable law designated under Article 4 (1) of Rome II (law of the place of the damage). Accordingly, the applicant cannot, for example, base the issue of liability of the defendant on the law of one country and base the question of compensation on the law of an-

[28] OPREA, A.: Noua reglementare europeana a conflictelor de legi in materie delictuala: regulamentul (ce) no 864/2007 (Roma II) (The new european regulation of conflict of laws in tort matters). In: *Romanian Private Law Magazine no. 3/2008*; cited according to the Study on the Rome II Regulation, JUST/2019/JCOO_FW_CIVI_0167, p. 479.

[29] Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations, JUST/2019/JCOO_FW_CIVI_0167.

[30] *Ibid*, p. 90.

[31] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") (presented by the Commission), Brussels, 22.7.2003, COM(2003) 427 final 2003/0168 (COD), p. 20.

other country. The splitting of the applicable law (*dépeçage*) is not permissible in the unilateral choice of law.[32]

In the event that one harmful event causes damage to several injured persons, each liability relationship is assessed separately.[33] Any person seeking compensation shall be entitled under Article 7 to unilaterally choose the applicable law. If, as a result of one harmful event, environmental damage (including damage to persons or property) occurs in several countries, the so-called mosaic principle applies when determining the applicable law pursuant to Article 4 (1) of Rome II (to each different place of direct damage corresponds a respective applicable law).

6.2.5 The interaction between Article 7 and selected articles in Rome II

The following sections will analyze Article 7 in the context of Article 1 (Scope), Article 4 (General Rule), Article 5 (Product Liability), Article 14 (Freedom of choice) and Article 17 (Rules of safety and conduct).

6.2.5.1 Links between Article 7 and Article 1 (Scope)

Rome II Regulation, within the meaning of its Article 1 (1), shall apply to non-contractual obligations in civil and commercial matters. The interpretation of the concept of "civil and commercial matters" became controversial in relation to claims for environmental damage raised by state authorities. There have been opinions in jurisprudence calling for so-called 'green interpretation' of the term "civil and commercial matters" in order to promote environmental protection by state authorities, including even the situations when public authority is exercised.[34] Such argumentation is fundamentally disagreed by *Dickinson*, according to whom the concept of 'civil and commercial matters' should not be interpreted differently in Article 7 from the other articles of the Rome II Regulation, even in order to protect the envi-

[32] DICKINSON, A.: *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford University Press, 2008, p. 440; also VALDHANS, J.: Právní úprava mimosmluvních závazků s mezinárodním prvkem. Praha: C. H. Beck, 2012, p. 197.

[33] Csach in CSACH, K., GREGOVÁ ŠIRICOVÁ, Ľ., JÚDOVÁ, E.: *Úvod do štúdia medzinárodného práva súkromného a procesného*. 2. vyd. Bratislava: Wolters Kluwer, 2018, s. 184.

[34] BERNASCONI, C., BETLEM, G.: European private international law, the environment and obstacles for public authorities. In: (2006) *Law Quarterly Review*, 122 (1), p. 135; KADNER GRAZIANO, T. M.: The Law Applicable to Cross-Border Damage to the Environment. In: *Yearbook of Private International Law*, 2008, vol. 2007, pp. 85–86.

ronment. The protection of the environment is already taken into account in Article 7 through the preferential rule for the person seeking damages.[35] A broad interpretation would not be consistent with how the term "civil and commercial matters" is interpreted by the Court of Justice of the EU in cases concerning the Brussels Ia[36] and Rome I Regulations, since the exercise of public authority does not fall under "civil and commercial matters".

Dickinson underlines the importance of the judgment in Case 814/79 *Netherlands State v Reinhold Rüffer* for the issue of the State's regression claims in relation to environmental damage. According to the CJEU, the concept of "civil and commercial matters" within the meaning of the Brussels Convention[37] does not include actions such as that referred to by the national court brought by the agent responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of the administering agent in the exercise of its public authority. The fact that in recovering those costs the administering agent acts pursuant to debt which arises from an act of public authority is sufficient for its action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the ambit of the Brussels Convention.[38]

In Case C-271/00 *Gemeente Steenbergen v Luc Baten*, the CJEU held that the concept of "civil matters" encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in "civil matters".[39]

[35] DICKINSON, A.: *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford University Press, 2008, p. 434.

[36] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

[37] The convention was the predecessor to the Brussels I Regulation (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters).

[38] Judgment of the European Court of Justice of 16 December 1980 in Case 814/79 Netherlands State v Reinhold Rüffer, Reports of Cases 1980, 03807, para. 15 and 16.

[39] Judgment of the Court of Justice of the EU of 14 November 2002 in Case C-271/00 Gemeente Steenbergen v Luc Baten, Reports of Cases 2002 I-10489, para. 37.

On the other hand, there is an example of a case where a claim for compensation for environmental damages raised by a State did fall under the scope of "civil and commercial matters". In case C-343/04 *Land Oberösterreich v ČEZ a. s.* it was not disputed between the parties that the concept of "civil and commercial matters" includes an action in which the State, as the owner of agricultural land, sued a company operating a nuclear power plant located in the territory of a neighbouring State for cessation of a nuisance caused to the agricultural land (in that situation the applicant does not exercise public authority).[40]

As already been mentioned above, according to Article 1 (2) f) of the Rome II Regulation, non-contractual obligations arising out of nuclear damage are excluded from the scope of this Regulation. The law applicable to a non-contractual obligation resulting from environmental damage caused by a nuclear incident will therefore not be determined pursuant to Article 7 of the Rome II Regulation. Unification conventions have been adopted in this area (see chapter 1.1).

6.2.5.2 Links between Article 7 and Article 4 (General rule)

The delicts in Articles 5–9 Rome II are deemed as special delicts (*lex specialis* to the general rule in Article 4 Rome II). Recital 19 to the Rome II Regulation explains that specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake. The need for a specific standard for a non-contractual obligation arising from environmental damage is illuminated in recital 25 to the Rome II Regulation by reference to EU primary law which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays. These objectives fully justify the use of the principle of discriminating in favour of the person sustaining the damage.

Article 7 differs from Article 4 in that the person seeking compensation has the opportunity to influence the applicable law. If he does not choose the option to base his claim on the law of the country in whose territory the event which caused the damage occurred, then Article 7 refers to Article 4 (1) Rome II. The non-contractual obligation is subsequently governed

[40] Judgment of the Court of Justice of the EU of 18 May 2006 in Case C-343/04 Land Oberösterreich v ČEZ as., Reports of Cases 006 I-04557, para 22, 23.

by the law of the country in which the damage occurred, irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the indirect consequences of that event occur.

Article 7 refers directly to Article 4 (1), but it does not refer to its other paragraphs. Consequently, paragraph 2 (applicable law in the case of common habitual residence of the person claimed to be liable and the person sustaining damage) and paragraph 3 (escape clause) should not be applied to environmental damage.[41]

As far as the interpretation of the terms "damage" and "indirect consequences" in Article 4 (1) is concerned, it should be pointed out that, in the context of environmental damage, these terms should be interpreted in accordance with the scope of Article 7. The scope of this conflict-of-law rule is "a non-contractual obligation arising from damage to the environment, including damage to persons or property." Where damage to the environment has caused damage to persons or property, it should not be included in the concept of "indirect consequences of the fact which caused the damage". On the contrary, such situation would fall under "damage" (so-called "direct damage"). This distinction is important, as the indirect consequences do not affect the applicable law.[42] At the same time, however, it is difficult to imagine a situation in which the environmental damage (quasi-primary damage) and the damage to persons or property (quasi-secondary damage) would be localized in different countries.

The qualification of "environmental damage" has recently been examined by the English courts in a series of proceedings concerning a claim following the death of a worker who fell from height whilst involved in the demolition of an oil tanker at a shipyard in Bangladesh. The claim could fail on limitation grounds as it was issued outside the Bangladeshi limitation period (Bangladeshi law would be the applicable law according to Article 4 as the law of the country where the damage occurred). The claimant invoked Article 7 of Rome II, which could enable him to opt for English law with a longer limi-

[41] Same conclusion in DICKINSON, A.: *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford University Press, 2008, p. 438.

[42] Likewise DICKINSON, A.: *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford University Press, 2008, pp. 436–437. Bogdan is of a different opinion. BOGDAN, M.: The Treatment of Environmental Damage in Regulation Rome II. In: AHERN, J., BINCHY, W. (eds.): *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*. The Hague, 2009, p. 223.

tation period. The High Court held that the claimant had a real prospect of success that English law applied pursuant to Article 7 as, although the proximate cause of death was the fall from height in Bangladesh, it was arguable that the accident resulted from a chain of events which led to the vessel being grounded and involved damage to a beach and tidal waters and that accordingly Article 7 could be engaged.[43] However, the Court of Appeal disagreed. It held that Article 7 is concerned with the law applicable to a non-contractual obligation: in other words, the duty of care. It is that duty that has to 'arise out of' environmental damage for Article 7 to apply at all. In essence, it is the duty to take all reasonable steps to ensure that the sale of the vessel for demolition purposes did not endanger human life or health. That duty did not arise out of environmental damage; it had nothing to do with environmental damage at all. It arose out of the complete absence of workplace safety.[44]

Interestingly, the court examines the causal link between the non-contractual obligation (duty of care) and the environmental damage, when it states that "the duty has to 'arise out of' environmental damage". In this reasoning, the environmental damage is understood as a personal injury. Therefore, the court did not look into the causal link between "environmental damage and damage sustained by persons or property as a result of such damage" that is to be found in Article 7 and could be another route of argumentation (probably with the same finding: the personal injury was not caused by the environmental damage, it was the lack of the safety harness).[45]

6.2.5.3 Links between Article 7 and Article 5 (Product Liability)

Environmental damage may also occur due to a defect in the product. Such damage potentially falls under both Article 5 and Article 7. However, the Rome II Regulation does not resolve the relationship between these articles. Competition between Article 5 and Article 7 can be seen as a competition between the interests (objectives) they protect. Priority should probably be given to the protection of the environment since its essence lies in the public interest. *Valdhans* notes that if a defective product has caused environmental damage, Article 7 will have to be applied instead of Article 5 since it

[43] Begum v Maran (UK) Limited [2020] EWHC 1846 (QB).

[44] Begum v Maran (UK) Ltd [2021] EWCA Civ 326, para. 82 (see also para. 83–93).

[45] Other interesting points of the judgement have been commented on by Geert van Calster: *Begum v Maran. A hopeful Court of Appeal finding on duty of care; however open issues on its engagement with Rome II's environmental heading*. Available at: https://gavclaw.com/tag/begum-v-maran/ (quoted 1 July 2022).

is a rule aimed at more specific situations.[46] The primacy of Article 7 is derived by *von Plehwe*, too, although only narrowly in the event of injury to health, where, in his view, Article 5 does not fulfill the interest in protecting the environment.[47] A more restrained position is held by *Bogdan*, who does not formulate the priority of any of these competing provisions and expects the interpretation by the CJEU.[48]

6.2.5.4 Links between Article 7 and Article 14 (Freedom of choice)

The Rome II Regulation does not specifically restrict the freedom of the parties to choose the law applicable to non-contractual obligations arising from environmental damage. Thus the choice shall be made possible under the conditions laid down in Article 14. It seems only logical, that once the parties agreed to submit non-contractual obligations to the law of their choice, the unilateral choice of law under Article 7 is no longer possible for the person seeking compensation.

6.2.5.5 Links between Article 7 and Article 17 (Rules of safety and conduct)

Pursuant to Article 17 of the Rome II Regulation, in assessing the conduct of the person claimed to be liable, the court shall take account, as a matter of fact, and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability. The particular importance of Article 17 in relation to Article 7 is described by the Commission in the 2003 Proposal for the Rome II Regulation: "A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator's conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under

[46] VALDHANS, J.: *Právní úprava mimosmluvních závazků s mezinárodním prvkem*. Praha: C. H. Beck, 2012, p. 178.

[47] von Plehwe in HÜßTEGE, R., MANSEL, H.-P. (hrsg.): *NomosKommentar BGB Band 6 – Rom-Verordnungen zum Internationalen Privatrecht*. 3rd Edition. Baden Baden: Nomos, 2019, p. 423.

[48] BOGDAN, M.: The Treatment of Environmental Damage in Regulation Rome II. In: AHERN, J., BINCHY, W. (eds.): *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*. The Hague, 2009, p. 229.

Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business."[49] The rule in Article 13 is reflected in the current Article 17 of the Rome II Regulation.

The application of Article 17 in relation to Article 7 is possible only in the case of delicts, where the damage and the event that caused the damage are localized in different countries. However, even with this type of delicts, it is relevant only in some situations. Article 17 refers to the safety rules in force at the place and time of the event giving rise to the liability. Therefore, the space for the application of Article 17 is only open if the person seeking compensation for damage did not unilaterally opt for *lex loci delicti commissi* (i.e., when the *lex loci damni* is applicable). For example, company X operating in State A caused environmental damage in State B but complied with the tolerated level of emissions in State A. Company Y seeks compensation for damage to its property located in State B as a result of this environmental damage. If the applicant has decided, pursuant to Article 7, to exercise his right to opt for the law of the country in which the event causing the damage occurred, then the court will not apply Article 17, since compliance with the emission standards in force in State A will already be part of the assessment of the applicant's liability under the applicable law (law of State A).

6.3 Environmental damage and corporate due diligence

On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence.[50] The aim of the Directive is to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance. The Proposal establishes a corporate due diligence duty. The core elements of this duty are identifying, bringing to an end, preventing, mitigating, and accounting for negative human rights and environmental impacts in the company's own operations, their subsidiaries, and their value chains. In addition, certain large companies need to have a plan to ensure that their business strategy is compatible with limiting glo-

[49] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") (presented by the Commission), Brussels, 22.7.2003, COM(2003) 427 final 2003/0168 (COD), p. 20.

[50] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

bal warming to 1.5 °C in line with the Paris Agreement. Directors are incentivised to contribute to sustainability and climate change mitigation goals.[51]

The proposal directly refers to the European Green Deal in its Recital 2: "A high level of protection and improvement of the quality of the environment and promoting European core values are among the priorities of the Union, as set out in the Commission's Communication on A European Green Deal.[52] These objectives require the involvement not only of the public authorities but also of private actors, in particular companies."

According to the Proposal, the rules on corporate sustainability due diligence will be enforced through administrative supervision (authorities designated by the Member States) and through civil liability. The Member States shall ensure that victims get compensation for damages resulting from the failure to comply with the obligations of the new proposals. It is most probable, that the claims for compensation will have a cross-border element, therefore, the Proposal is interesting also from the Private International Law perspective.

The Proposal does not formulate any conflict-of-law rules for the environmental damage (nor for human rights abuse), however, the solution is to be found in Article 22 titled "Liability". Firstly, Article 22 (1) requires the Member States to establish rules governing the civil liability for damages due to the company's failure to comply with the due diligence requirements set in Article 7 and Article 8. Subsequently, Article 22 (5) further contains a following rule: "Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State." The explanation can be found in Recital 61 to the proposed Directive: "In order to ensure that victims of human rights and environmental harms can bring an action for damages and claim compensation for damages arising due to a company's failure to comply with the due diligence obligations stemming from this Directive, even where the law applicable to such claims is not the law of a Member State, as could for instance be the case in accordance with international private law rules when the damage occurs in a third country, this Directive should require Member States to ensure that

[51] Corporate Sustainability Due Diligence. https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en (quoted 1 July 2022).

[52] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Region "The European Green Deal" (COM/2019/640 final).

the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.[53]

Thus the proposal aims to establish that the national civil law transposing Article 22 has the character of "overriding mandatory provisions".[54] Such provisions are defined in Rome II Regulation (Article 16) as the provisions of the law of the forum that are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. It would make more sense if the wording in the Directive followed the definition from Rome II more closely, e.g.: the Member States shall ensure that the provisions of national law transposing this Article are mandatory irrespective of the law otherwise applicable.

The formulation of Article 22 (5) leaves it for the Member States to establish in their respective national rules that the transposed liability regime has overriding mandatory character. *Van Calster* thinks that the proposal could avoid difficulties in case a Member State fails to declare the overriding mandatory nature by declaring: "Member States' provisions of national liability law transposing this Article are of overriding mandatory application".[55] On the other hand, it could be beneficial for the legal practice to have the overriding mandatory character expressed in the national rules as well.

Critical remarks were raised by *Dias* who notes that this drafting option does not leave room for the application of foreign, non-EU law more favourable to the victims. Interestingly, the author refers to Article 7 of Rome II: "If a more classical conflicts approach would have been followed, for example, mirrored in Article 7 of Rome II, the favor laesi approach could be extended to the whole scope of application of the Directive, so that the national law of the Member State where the event giving rise to the damage occurred could be invoked under general rules [Article 4(1) of Rome II], but a more favour-

[53] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

[54] This solution was proposed by RÜHL, G.: *Human Rights in Global Supply Chains: Do We Need to Amend the Rome II Regulation?* Available at: https://eapil.org/2020/10/09/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/ (quoted 1 July 2022).

[55] van CALSTER, G.: *The European Commission's Corporate Sustainability Due Diligence proposal. Some thoughts on the conflict of laws*. Available at: https://gavclaw.com/2022/03/25/the-european-commissions-corporate-sustainability-due-diligence-proposal-some-thoughts-on-the-conflict-of-laws/ (quoted 1 July 2022).

able lex locus damni would still remain accessible."[56] However, the argumentation is not that clear: it is more likely, that the national law of the Member State would be lex loci delicti commissi (e.g. the law of the Member State where the corporation failed to exercise due diligence) and the non-EU law would be lex loci damni (place of the environmental damage).

Another interesting question comes to mind: If the application of the national law transposing the Directive is mandatory, are we going to use it also for such questions as the division of liability, assessment of damage, rules of prescription and limitation, etc.? The philosophy in the Rome II Regulation is to draw all these sub-questions under the law applicable to the particular non-contractual obligation (Article 15), however, *van Calster* suggests differently (the remainder of the action will remain subject to the lex causae otherwise applicable).[57] In that case, the field would be open for Article 7 Rome II to be applicable (possibly thus resulting in fragmentation of applicable law).

Conclusion

In order to properly determine the law applicable to civil liability for cross-border environmental damage, it is necessary, in the first place, to establish whether the particular type of damage is regulated by any international conventions (e.g. nuclear damage, marine pollution). If the answer is negative, then the conflict-of-law rule is to be found in Article 7 of the Rome II Regulation, a *lex specialis* conflict-of-law rule against the general rule in Article 4 of the Rome II Regulation, containing a specific option to unilaterally choose the applicable law. This paper has examined the legislative development, objectives, material scope, and functioning of the Article as well as its relations to other selected Articles in the Rome II Regulation. It has pointed to problems with the qualification of environmental damage and the relationship between Article 7 and Article 4 and highlighted recent case law that suggests problems with causation. Finally, attention was paid to the Proposal for a Directive on Corporate Sustainability Due Diligence that is related to the envi-

[56] DIAS, R.: *CSDD and PIL: Some Remarks on the Directive Proposal*. Available at: https://conflictoflaws.net/2022/csdd-and-pil-some-remarks-on-the-directive-proposal/(quoted 1 July 2022).

[57] van CALSTER, G.: The European Commission's Corporate Sustainability Due Diligence proposal. Some thoughts on the conflict of laws. Available at: https://gavclaw.com/2022/03/25/the-european-commissions-corporate-sustainability-due-diligence-proposal-some-thoughts-on-the-conflict-of-laws/ (quoted 1 July 2022).

ronmental damage and aims to establish that the national civil law transposing the Directive has the character of overriding mandatory provisions. The author has proposed clarification in the wording of this rule in Article 22 (5) and pointed to the problem with the scope of the applicable law.

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39.) International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;

40.) International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;

41.) Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

42.) Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") (presented by the Commission), Brussels, 22.7.2003, COM(2003) 427 final 2003/0168 (COD), p. 19.

43.) Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations, JUST/2019/JCOO_FW_CIVI_0167.

44.) Judgment of the European Court of Justice of 16 December 1980 in Case 814/79 *Netherlands State v Reinhold Rüffer*, Reports of Cases 1980, 03807, para. 15 and 16.

45.) Judgment of the Court of Justice of the EU of 14 November 2002 in Case C-271/00 *Gemeente Steenbergen v Luc Baten*, Reports of Cases 2002 I-10489, para. 37.

46.) Judgment of the Court of Justice of the EU of 18 May 2006 in Case C-343/04 *Land Oberösterreich v ČEZ as.*, Reports of Cases 006 I-04557, para 22, 23.

47.) Begum v Maran (UK) Limited [2020] EWHC 1846 (QB).

48.) Begum v Maran (UK) Ltd [2021] EWCA Civ 326, para. 82 (see also para. 83–93).

49.) Corporate Sustainability Due Diligence. https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en (quoted 1 July 2022).

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7 BIODIVERSITY PROTECTION FROM THE PERSPECTIVE OF THE EUROPEAN GREEN DEAL AND OTHER CURRENT RELEVANT INTERNATIONAL LEGISLATION

Juraj Panigaj

Abstract

It has been exactly 20 years since the United Nations Conference on environment and development. One could assume that after all these years since the conference took place, there will be far more greater accomplishments and outcomes regarding biodiversity protection. Although we cannot deny the progress that has been made in the area of legal and factual environmental protection, it is not sufficient enough. With EU green deal there was a new hope on the horizon, even for biodiversity protection itself, considering the fact the EU did not meet some of its most important environmental objectives for 2020, such as the Aichi targets under the Convention on Biological Diversity. Firstly, the article briefly evaluates development in an area of biodiversity protection and then moves to the analysis of biodiversity protection within the EU green deal, as the primary objective of the paper. The paper analyzes whether the EU green deal and following legislation provides a sufficient legal framework for biodiversity protection. Beside it, the article discusses other current legal international instruments within this area. Furthermore, the article focuses on challenges the international society, or the EU itself will most likely face on its journey towards fulfilling the set commitments and provide its opinion on feasibility of such challenges.

Introduction

Biodiversity is the key word of this article. The Convention on Biological Diversity defines it as the diversity of all living organisms, including their terrestrial, marine and other aquatic ecosystems and ecological complexes of which they are part; biological diversity encompasses diversity within species, between species and diversity of ecosystems.[1] In a recent study conduct-

[1] *Convention on Biological Diversity*, June 5, 1992; 1760 U.N.T.S. 79, 143; 31 I.L.M. 818 (1992).

ed by researchers from the Weizmann Institute of Science and the California Institute of Technology, an estimate was made that the human population accounts for only 0.01% of all living organisms in the mass volume.[2] Despite this fact, this "small" group of living organisms has a major share in the current destruction of biodiversity. Over the last 50 years, biodiversity on land has been reduced by almost 70% and within marine areas by 50%.[3] They say that the action will provoke a reaction. In the figurative sense of the word, even these catastrophic facts have recently triggered a massive response on the part of the European Union, as well as the international community as such. In this context, work analyses, in particular, the current efforts and measures taken, both in the European Union and the Convention on Biological Diversity. The work addresses whether the European Green Deal provides or will provide an adequate legal framework for the protection of biodiversity, including in conjunction with older legislation in the form of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. Although legislative, legally binding measures adopted here are principally relevant, the article also does not neglect non-binding types of documents and acts whose political and moral impact should not be underestimated. Consequently, the work briefly reflects the current situation on the basis of the Convention on Biological Diversity in conjunction with the Conference of the Parties to the Convention held in 2021. In conclusion, the thesis evaluates whether the current legal status of biodiversity protection is sufficient.

7.1 Protection of Biodiversity from the Perspective of the European Green Deal Initiative

European Green Deal (hereinafter also as "EGD") is described as one of the biggest environmental law milestones in the EU and, among other things,

[2] FUTHAZAR, G.: *Biodiversity, Species Protection and Animal Welfare Under International Law*. In: PETERS, A. (ed.): *Studies in Global Animal Law*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 290, 2020, pp. 95–109. Online: https://link.springer.com/book/10.1007/978-3-662-60756-5 (quoted 1 July 2022).

[3] SARKAR, S.: *Nature in peril as biodiversity losses mount alarmingly, states the Living Planet Report*, MONGABAY, 16 September 2020. Online: https://india.mongabay.com/2020/09/nature-in-peril-as-biodiversity-losses-mount-alarmingly-states-the-living-planet-report/ (quoted 1 July 2022).

in the field of biodiversity protection. EGD was preceded by a declaration of climate emergency by the European Parliament on 28.11.2019.[4] Subsequently, the European Union presented its objectives at COP25 (25 December 2019, where it made a commitment to climate neutrality by 2050, and announced the implementation of the European Green Deal through the European Commission).[5] It is a strategy, or to be more accurate initiative, whose main objective is to make the European Union (hereinafter the "EU") the first climate neutral continent by 2050, which should lead to Europe becoming the so-called 'green continent', with a cleaner environment, more accessible energy,[6] whether, for the purposes of this contribution, with appropriate protection, conservation and strengthening of biodiversity. As part of this initiative, the EU intends to invest a dizzying one trillion euros (10^{18}) in the economy driven by renewable energy, in the decarbonisation or digitalisation of the European economy.[7]

The main priorities of the European Green Deal in the way of achieving the objective set are, in particular, protecting biodiversity and ecosystems, reducing pollution (of air, water and soil), adapting to the circular economy, improving waste management and ensuring the sustainability of blue economies and fisheries sectors.[8]

Indeed, the importance and expectations are high if we look back at achieving the EU's objectives under the Convention on biological diversity, specifically in relation to the Aichi targets. This is ultimately apparent from the Commission Communication [COM (2019) 640 final] of 11.12.2019 on the European Environment Convention, where it states in point 2.1.7: *"How-*

[4] European Parliament: *The European Parliament has declared a climate emergency in the Union*, Press Release, 28 November 2019. Online: https://www.europarl.europa.eu/news/sk/press-room/20191121IPR67110/europsky-parlament-vyhlasil-v-unii-klimaticku-pohotovost (quoted 1 July 2022).

[5] *Statement on the value of the European Union and its Member States Opening Plenary of the Minsterial Segment of COP25*, 10 December 2019. Online: https://unfccc.int/sites/default/files/resource/EU_cop25cmp15cma2_HLS_EN.pdf (quoted 1 July 2022).

[6] PATEL, A., ROBINSON, T.: *The EU Green Deal explained*, NORTON ROSE FULBRIGHT, April 2021. Online: https://www.nortonrosefulbright.com/en/knowledge/publications/c50c4cd9/the-eu-green-deal-explained#20 (quoted 1 July 2022).

[7] DE SOUSA, B.: *Europe´s Green deal: A dream or a goal?*, Eyes on Europe. 24 January 2022. Online: https://www.eyes-on-europe.eu/europes-green-deal-a-dream-or-a-goal/ (quoted 1 July 2022).

[8] European Commission: *Protecting the environment and oceans with the Green Deal*. Online: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/protecting-environment-and-oceans-green-deal_en (quoted 1 July 2022).

ever, the EU is failing to meet some of its most important environmental targets for 2020, such as the Aichi targets set out in the Convention on Biological Diversity." These objectives were part of a separate EU 2020 strategy on biodiversity (or the 2020 strategy was adopted as in order to achieve the objectives of Aichi), within which the EU also set its own objectives,[9] but for which, in the sense of the European Commission's assessment report, there was no adequate progress, or if progress occurred, was insufficient.[10] The 2020 strategy was an ambitious project, at least on paper, which ultimately "broke its ligament," as well as another similar plans to date. Due to lack of resources or political will, it failed to celebrate success, and only some of the objectives set out in it, it managed to partially meet.[11] The failure in question should therefore serve as a memento for the implementation of the European Green Deal, that the real achievement of the more modest objectives is always more useful than unjustified optimism on paper, which is, however, incompatible with reality. Of course, the lack of political will went hand in hand with the fact that the strategy in question was primarily of a political nature and lacked adequate legal binding. Legally binding, however, it was possible to see that these objectives were also based on the international commitments of the EU and its Member States, which were signed up to at the biodiversity summit in Nagoya, Japan in October 2010 (Meeting of the Parties to the Convention on Biological Diversity).[12] This summit adopted, inter alia, the so-called Aichi targets.[13] Since the European Union has been a Contracting Party to the Convention on Biological Diversity since 1994, the commit-

[9] DOWNING, G., PROUCHET, L., REIMANN, L.: *Protecting Biodiversity in the EU: The failures of the Biodiversity Strategy 2020 and what we can learn for the future*, Generation Climate Europe, 14 September, 2021. Online: https://gceurope.org/protecting-biodiversity-in-the-eu-the-failures-of-the-biodiversity-strategy-2020-and-what-we-can-learn-for-the-future/ (quoted 1 July 2022).

[10] *Ibid.*

[11] *Ibid.*

[12] European Commission: *The EU Biodiversity Strategy to 2020*, Luxembourg: Publications Office of the European Union, 2011, p. 7, ISBN: 978-92-79-20762-4. Online: https://op.europa.eu/sk/publication-detail/-/publication/d08b593c-4818-4e27-935d-a1385e7f7413/language-en (quoted 1 July 2022).

[13] Convention on Biological Diversity: *Notification: City Biodiversity Summit 2010, Nagoya City, Aichi Prefecture, Japan, from 24 to 26 October 2010*, (Ref.: SCBD/OH/cr/ch/70364), 4 February 2010. Online: https://www.cbd.int/kb/record/notification/1385?Subject=CITY (quoted 1 July 2022).

ments in question also concerned the Convention on Biological Diversity itself. All EU Member States are also Parties to the Convention.[14]

In the case of the Aichi targets, these were 20 different targets aimed at conservation of nature and thus ultimately animal and plant species. These objectives were organised under 5 basic points, which discussed e.g. reducing direct pressure on biodiversity, promoting sustainable exploitation, protecting ecosystems, species and genetic diversity, etc.[15] As we have said, the overall initiative adopted at the Nagoya Summit consisted of 20 sub-objectives. The European Union has succeeded in some major progress in relation to objective No. 11, which consisted of a commitment to create marine protected areas of at least 10% of the total scale attributable to Europe.[16] In 2016, the European Union reported a number of marine protected areas in the range of 10.8%. The portal "STATISTICS for the European GREEN DEAL", which draws data from Eurostat, shows that approximately 10.7% of these areas were protected as of 2019.[17] The figures show that although it was one of the few achievements in the field, its further development is not yet taking place. However, unsatisfying figures can serve as an incentive for the EU and its Member States to meet the targets set under the European Green Deal. But again, statements on paper are not enough, because it can withstand a lot. Time will show whether individual targets will be gradually achieved and individual measures to promote and protect biodiversity will be implemented.

However, the EU's ambition cannot be denied. There is also a strong commitment to the implementation of the European Green Deal in the work of the European Parliament. In June 2021, it issued a resolution *"The EU Biodiversity Strategy for 2030: Bringing nature back to our lives."* The European Parliament's[18] stronger action is also due to the ever-deteriorating state of the environment or biodiversity. Probably the most important reason is

[14] *List of Parties to the Convention on Biological Diversity*. Online: https://www.cbd.int/information/parties.shtml (quoted 1 July 2022).

[15] *Key Elements of the Strategic Plan 2011-2020, including Aichi Biodiversity Targets,* Convention on Biological Diversity, 5 November 2018. Online: https://www.cbd.int/sp/elements/ (quoted 1 July 2022).

[16] *EU reaches the Aichi target of protecting ten percent of Europe's seas*, EEA, 25 October 2018. Online: https://www.eea.europa.eu/highlights/eu-reaches-the-aichi-target (quoted 1 July 2022).

[17] Eurostat: *Statistics for the European Green Deal*. Online: https://ec.europa.eu/eurostat/cache/egd-statistics/ (quoted 1 July 2022).

[18] European Parliament: *MEPs calls for binding targets for the protection of wild animals and humans*, Press Release, 9 June 2021. Online: https://www.europarl.europa.eu/news/sk/

evident from a report by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, which states that up to one of the currently eight million known species of fauna and flora is currently at risk of extinction (75% of all are insects).[19] For example, the European Parliament demanded that by 2030 at least 30% of land and marine areas be protected, with at least one third strictly protected. Other requirements included increased protection of wildlife, greening of cities (so-called urban biodiversity), and protection related to halting the decline in bee populations or other pollinators.[20]

Most importantly, however, Parliament called for a legislative proposal following the model of "European climate law".[21] For climate, it is Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').[22] This regulation extends EU legislation in this area, including Directive 2003/87/EC of the European Parliament and of the Council establishing the EU ETS, Regulation (EU) 2018/842 of the European Parliament and of the Council establishing national greenhouse gas emission reduction targets by the year 2030, and Regulation (EU) 2018/841 of the European Parliament and of the Council imposing an obligation on Member States to ensure a balance between existing greenhouse gas emissions and greenhouse gas emissions removed from land use, land use change and forestry. The adoption of this Regulation originates from the need to fulfil the EU's obligations both in relation to the Paris Agreement, adopted on the basis of the United Nations Framework Convention on Climate Change and in relation to the European Green Deal. It also responded to a 2018 report

press-room/20210604IPR05513/biodiverzita-ep-ziada-zavazne-ciele-na-ochranu-volne-zijucich-zvierat-a-ludi (quoted 1 July 2022).

[19] IPBES: *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, Version 1, 2019, p. 28, ISBN: 978-3-947851-20-1. Online: https://wilderness-society.org/celebrating-40-years-of-eu-birds-directive/ (quoted 1 July 2022).

[20] European Parliament: *MEPs calls for binding targets for the protection of wild animals and humans*, Press Release, 9 June 2021. Online: https://www.europarl.europa.eu/news/sk/press-room/20210604IPR05513/biodiverzita-ep-ziada-zavazne-ciele-na-ochranu-volne-zijucich-zvierat-a-ludi (quoted 1 July 2022).

[21] *Ibid.*

[22] *Regulation (EU) No 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing a framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.*

by the Intergovernmental Panel on Climate Change, on the impact of global warming.[23] The main objective of the regulation is to provide a framework for achieving climate neutrality in the EU by 2050, along with several Intermediate Union climate targets, including a 55% reduction of domestic net greenhouse gas emissions (emissions minus removal) by 2030, compared to 1990 levels).[24] The regulation in question is also of great importance for the protection of biodiversity. The preamble itself refers to the assessment report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, based on which climate change is the third most important driver of biodiversity loss.[25] These are recognised, for example, by the Contracting Parties to the Convention on Biological Diversity, where they state in the Kunming Declaration that the main direct drivers of biodiversity loss include land and sea use changes, excessive use of natural resources, climate change, pollution and invasive foreign animal and plant species.[26] It can be concluded that biodiversity and climate are linked in such a way that a negative or possibly positive phenomenon in one area will certainly affect the other area. In view of the objectives adopted in this Regulation, in particular in relation to the reduction of emissions by 55% by 2030, a number of other legislative acts in this field will also need to be amended in order to bring their content into line with that objective. The other regulations were set at a target of 40%.[27]

Similarly, as was the case with European climate legislation, a similar procedure should have taken place in the case of biodiversity protection. On 23.3.2022, the European Commission was due to submit a proposal for an 'EU Nature restoration law', which was to be part of the EU Biodiversity Strategy for 2030. However, on the part of the commission there was a postponement of this deadline, without specifying a new deadline.[28] This procedure,

[23] *Ibid., Points 1 and 2 of the Preamble.*

[24] *Ibid., Art. 1, 2, 4.*

[25] *Ibid.*

[26] Declaration from the High-Level Segment of the UN Biodiversity Conference 2020 (Part 1) under the theme: *"Ecological Civilization: Building a Shared Future for All Life on Earth"* (Kunming Declaration). October 13, 2021. Online: https://www.cbd.int/doc/c/df35/4b94/5e86e1ee09bc8c7d4b35aaf0/kunmingdeclaration-en.pdf (quoted 1 July 2022).

[27] PÉREZ DE LAS HERAS, B.: E*uropean Climate Law(s): Assessing the Legal Path to Climate Neutrality*. In: Romanian Journal of European Affairs, Vol. 21, No. 1, December 2021, p. 28. Online: https://ssrn.com/abstract=3991862 (quoted 1 July 2022).

[28] BRANDEHOF, J.: *Delay of the EU Nature Restoration Law*, Eurosite. March 30, 2022. Online: https://www.eurosite.org/brussels/delay-of-the-eu-nature-restoration-law/ (quoted 1 July 2022).

of course, has caused massive criticism when more than 13,000 EU citizens and 166 environmentally oriented NGOs (as well as the EU Environment Ministers Group) responded to this Commission's procedure.

However, after a few postponements, according to official statements, the proposal for a new regulation should be submitted this summer (2022). This would be a milestone in protecting biodiversity within the EU, where there has been no basic legally binding instrument in this area so far. We will mention Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.[29] Of the various types of legal acts of the European Union, the regulation is best suited to ensure the most ideal regulation within the EU. This is due, in particular, to its universality and for reasons of its binding integrity and direct applicability in all Member States.[30] Although the EU has managed to slow down biodiversity loss in the last 30 years, up to 81% of habitats have insufficient or possibly poor conservation status (as stated by the European Environment Agency).[31] Speaking at the annual EU Green Week event (held from 30 May to 5 June 2022), Ursula von der Leyn, President of the European Commission, said that the draft regulation should be submitted within a few weeks.[32]

If we recapitulate the above, there can be seen a high determination in EU action in the implementation of the European Green Deal. From a certain perspective, this can be seen as an exaggerated, counterproductive effort that will rather limit the EU in the short term to the detriment of other countries with more benevolent legislations. For example, if we look at the statistical results obtained by the Statistical Review of World Energy 2021, in the top 10 most polluted countries in 2020, only Germany was "ranked" as European representative, on the seventh position. On a global scale, CO_2 emissions of 32 billion tonnes were released into the atmosphere. The first six countries amounted to almost 20 billion of the total carbon dioxide produced. Germany accounted for around 605 million tonnes, representing 1.87% of the total

[29] *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.*

[30] *Consolidated version of the Treaty on the Functioning of the European Union* (1957), Official Journal C 326, 26/10/2012, p. 0001–0390.

[31] TAYLOR, K.: *EU plans law to reverse decades of biodiversity loss*, Euractiv, 10 June 2022. Online: https://www.euractiv.com/section/energy-environment/news/eu-plans-law-to-reverse-decades-of-biodiversity-loss/ (quoted 1 July 2022).

[32] *Ibid.*

carbon dioxide production.[33] In addition, Germany accounts for one-quarter of the total production of CO_2 within the EU.[34] On the basis of these figures, it can be seen that although the measures taken, including in legislative form, are positive for protecting the environment in Europe, on the other hand, Europe does not take such a dizzying part in the pollution of the planet (at least in the form of emissions).

Although it may appear that the European Union is doing some kind of 'surplus labor', the inspirational nature of such a procedure cannot be excluded from the equation. For example, in March 2020, the EU presented its long-term low-emission development[35] strategy to the United Nations Framework Convention on Climate Change ("UNFCCC"), followed by its nationally determined contribution (so-called "NDC") in December 2020.[36] This contribution represents certain objectives and ambitions of the Contracting Party (Art. 4, par. 2 and 3).[37] The EU Strategy itself states that the aim of the European Union and its Member States is to inspire the adoption of global climate action and to demonstrate that climate neutrality is not only necessary, but also feasible and desirable.[38]

7.1.1 Other Important Legislation on EU Soil

Of course, protecting biodiversity in the EU is not just about the European Green Deal and other related initiatives. Council Directive 79/409/EEC of

[33] *Most polluted countries in the world: 2022 ranking*, Climate Consulting by Selectra. 25 January 2022. Online: https://climate.selectra.com/en/carbon-footprint/most-polluting-countries (quoted 1 July 2022).

[34] *Ibid.*

[35] *Submission by Croatia and the European Commission on the European Union and its Member States, Subject: Long-term low greenhouse gas emission development strategy of the European Union and its Member States*, 6 March 2020. Online: https://unfccc.int/sites/default/files/resource/HR-03-06-2020%20EU%20Submission%20on%20Long%20term%20strategy.pdf (quoted 1 July 2022).

[36] *Submission by Germany and the European Commission on the European Union and its member states, Subject: The update of the nationally determined contribution of the European Union and its Member States*, 17 December 2020. Online: https://unfccc.int/sites/default/files/NDC/2022-06/EU_NDC_Submission_December%202020.pdf (quoted 1 July 2022).

[37] Conference of the Parties, *Adoption of the Paris Agreement*, Dec. 12, 2015 U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

[38] *Submission by Croatia and the European Commission on the European Union and its Member States, Subject: Long-term low greenhouse gas emission development strategy of the European Union and its Member States*, 6 March 2020. Online: https://unfccc.int/sites/default/files/resource/HR-03-06-2020%20EU%20Submission%20on%20Long%20term%20strategy.pdf (quoted 1 July 2022).

2 April 1979 on the conservation of wild birds is one of the oldest regulations on EU soil (or at that time still the EEC) in this area. The latter, after several amendments, currently appears as Directive 2009/47/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (so-called "The Birds Directive").[39] The purpose of the Directive covers the protection of all species of wild birds naturally occurring in the European territory of the Member States.[40] Conservation covers more than 500 species of wild birds, and one of the main achievements of the directive is to provide more than 5,650 bird conservation sites covering more than 843,000 km^2 of EU territories and marine areas (an important part of Natura 2000).[41]

The Directive provides for the specific protection of selected species in Annexes I and II. Annex I lists species which are subject to specific measures for the conservation of their habitats in order to ensure their survival and reproduction in the area of their spread.[42] In 2015, a study was carried out looking at the benefits of the Directive and comparing population trends between species listed in Annex I and those not listed therein. The development between 1980 and 2012 was compared, including with regard to climate change. The research shows that Annex I to the Directive had a positive impact on the conservation and sustainability of the species referred to therein, or those species have achieved better results than those not listed in Annex I.[43] What is more surprising from our point of view is the fact that, despite some reactions to climate change, Annex I has a strong, independent effect on bird populations, in other words, climate change has not reduced the

[39] *Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version).*

[40] *Ibid.*

[41] European Commission: *Environment: EU celebrates 40 years of the Birds Directive*, press release, 2 April 2019. Online: https://ec.europa.eu/info/news/environment-eu-celebrates-40-years-birds-directive-2019-apr-02_en (quoted 1 July 2022).

[42] *Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version).*

[43] European Commission: *Science for Environment Policy: How effectively does the Birds Directive protect birds?*. Online: https://ec.europa.eu/environment/integration/research/newsalert/pdf/how_effectively_does_the_birds_directive_protect_birds_432na2_en.pdf (quoted 1 July 2022). See also: SANDERSON, F., POPLE, R., IERONYMIDOU, C., BURFIELD, I., GREGORY, R., WILLIS, S., HOWARD, C., et. al.: *Assessing the Performance of EU Nature Legislation in Protecting Target Bird Species in an Era of Climate Change.* In: Conservation Letters: A Journal of the Society for Conservation Biology, 2015. Online: https://conbio.onlinelibrary.wiley.com/doi/pdf/10.1111/conl.12196 (quoted 1 July 2022).

effectiveness of the directive. The research clearly shows a positive impact on target bird species, alongside other population drivers such as climate change or migration strategies. In conclusion, the study authors said that multilateral conventions on similar conservation can have a significant positive impact on wildlife, despite unprecedented climate change.[44] This study also shows that nature conservation must be comprehensively perceived, and quality measures must be taken both in the area of climate change and the protection of individual species of animals, plants and other living organisms.

Nevertheless, a number of Member States have not incorporated individual obligations into their national orders, resulting in illegal bird hunting, and many species are therefore still among endangered species with population regression.[45]

The Directive on the conservation of wild birds is an important legislative element of nature conservation in the EU, but it is hand-in-hand with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna (hereinafter referred to as the 'Habitats Directive').[46] There are views that these directives represent the most effective nature conservation legislation in the world.[47] Council Directive 92/43/EEC provides for the protection and conservation of a wide range of rare, endangered or endemic animal and plant species. Likewise, it provides protection to just over 200 rare and characteristic habitats.[48]

Similarly to the Directive on the conservation of wild birds, this Directive has shaped the Natura 2000 strategy by establishing a network of protected areas or habitats.[49] However, the available data and scientific research show that the Habitats Directive does not fulfil its potential or the required changes have not occurred over the years in view of the ever-deteriorating status of biodiversity. A number of shortcomings are accused by it. First of all, it should be noted that the protection in the case of the Habitats Directive

[44] *Ibid.*

[45] HUISMAN, N.: *Celebrating 40 years of EU Birds Directive*, European Wilderness Society, 2019. Online: https://wilderness-society.org/celebrating-40-years-of-eu-birds-directive/ (quoted 1 July 2022).

[46] *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.*

[47] HUISMAN, N.: *Celebrating 40 years of EU Birds Directive*, European Wilderness Society, 2019. Online: https://wilderness-society.org/celebrating-40-years-of-eu-birds-directive/ (quoted 1 July 2022).

[48] European Commission: *The Habitats Directive*. Online: https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm (quoted 1 July 2022).

[49] *Ibid.*

is more closely conceived than in the Directive on the conservation of wild birds. While here the Directive protects primarily the flora and fauna of European importance (Art. 2, par. 2),[50] The Wildbird Conservation Directive provides universal protection to all wild birds.[51]

If we look at the individual species of flora and fauna, which are listed in its individual annexes, we do not find there any representative from the mushroom kingdom. The directive does not mention them in any way. This is a significant drawback, because fungi are no less important for the health of the ecosystem than plants or animals. The aim of the Directive is, in accordance with 2, par. 1, inter alia, to contribute to the provision of biological diversity. Biological diversity can be synonymously named as biodiversity. However, the Directive nowhere gives a definition of what biodiversity is (therefore it is necessary to rely on the Convention on Biological Diversity). A substantially more generous approach of the Directive to the granting of various exemptions, as is the case with the Directive on the conservation of wild birds, can be seen as another shortcoming in the order.[52]

One of the unsatisyfing facts is that one can see the fact that animals are given considerably more space and interest than plants within the meaning of the Directive and its application. Also, in most professional works on the issue of biodiversity protection, plants are given considerably narrower space, not to mention mushrooms. Even from the activities of the Court of Justice of the EU, this 'trend' can be seen. While not a single procedure has been brought before the Court of Justice in relation to the failure to protect a particular plant species, several cases have been brought before the Court of Justice in respect of animal species.[53] We can include, for example, Case C-383/09 (Commission v. France, failure to protect the field hamster, *Cricetus cricetus*),[54] C-342/05 (Commission v. Finland, hunting for a grey wolf, *canis lupus*, and hence failure in relation to its protection).[55] In the light of the timeliness and of the parties to the proceedings, it is also necessary to men-

[50] *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.*

[51] *Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version).*

[52] AMOS, R.: *Assessing the Impact of the Habitats Directive: A Case Study of Europe's Plants*. In: Journal of Environmental Law, Vol. 33, Issue 2, March 2021, p. 372. Online: https://doi.org/10.1093/jel/eqab006 (quoted 1 July 2022).

[53] *Ibid.,* p. 368.

[54] *Case C-383/09 Commission v France* [2011] ECR I-4869.

[55] *Case C-342/05 Commisiion v Finland* [2007] ECR I-04713.

tion Case C-661/20 (Commission v. Slovak Republic, failure in relation to the conservation of Capercaillie, lat. *Tetrao urogallus*, and Natura 2000 territory containing habitats of this wild bird).[56] All of these cases were based on formal infringement procedure launched by the Commission for failure to fulfil obligations, namely obligations under the Habitats Directive, respectively. Directives on the conservation of wild birds.

In the case of the Slovak Republic, the decision infringed both of the above-mentioned directives. The Slovak Republic did not implement adequate impact assessments under forest care programmes, and what is more, it did not take appropriate measures to prevent the intensive logging of large areas as a result of intensive logging and the use of pesticides to combat subcortical insects in the territories Natura 2000 has been damaged and substantially disturbed in the habitats of Capercaillie in these areas.[57]

In the case C-383/09, the field hamster was endangered for similar reasons, such as the plant *Euphorbia nicaeensis All*., and therefore the reasons were mainly urbanisation and land use changes. Nevertheless, this plant species, which also "achieved" unsatisfactory preservation status (in 2015 it was identified as an endangered species by the International Union for the Conservation of Nature), was not granted a similar 'protection' in the form of a Commission action to that of a field hamster.[58]

If we mention one more shortcoming, that is indeed an inconsistent protection of certain species within the framework of the Habitats Directive. In its annexes, the latter lists largely identical species (in particular plant species), as was the case at the time of its adoption in 1992. The fact that many of them are also currently at risk means that protection through the Directive is insufficient, at least in terms of plant species. On the other hand, however, it can be concluded that, formally, protection is directed towards the species in need.[59]

As Amos points out, in promoting the conservation of the species referred to in the Habitats Directive, it could help the Commission if it were so called

[56] *Case C-661/20 Commission v Slovak republic* [2022].

[57] EU Court of Justice: *Conservation of Tetrao urogallus and Natura 2000 sites with habitats of this wild bird: The Court found that Slovakia infringes the Habitats and Birds Directives by Slovakia*, Press Release No. 107/22, 22 June 2022. Online: https://curia.europa.eu/jcms/jcms/Jo2_7052/sk/ (quoted 1 July 2022).

[58] AMOS, R.: *Assessing the Impact of the Habitats Directive: A Case Study of Europe's Plants*. In: Journal of Environmental Law, Vol. 33, Issue 2, March 2021, p. 391. Online: https://doi.org/10.1093/jel/eqab006 (quoted 1 July 2022).

[59] *Ibid.,* p. 384.

The IUCN Red List ("IUCN red list") incorporated as an official measurement of the status of European species, in particular in the enforcement of EU law on the protection and conservation of the country.[60] Amos further submits that the reason is, for example, that, while the system used by the Directive is of a legal nature, created by law, the assessments under the auspices of the Red list are of a purely technical nature, based on the evaluation of independent experts using objective criteria.[61] The Red list was created by the International Union for the Conservation of Nature ("IUCN"), and is currently the most important source of information on the global state of the risk of extinction of animals, plants or fungi. Due to its scientific and objective character, it is used globally by scientists or other subjects engaged in nature conservation.[62] It could serve as an adequate source of information for the relevant EU institutions as to whether its member states are fulfilling its obligations under EU rules on protection (biodiversity). Such an independent and objective source of information could also serve to reduce the risk that, due to pressure from some Member States, the Annexes to the Habitats Directive will be amended, with a view to pushing for the decommissioning of a species that is at risk of extinction. This could happen, for example, in situations where it is a severely endangered species, but the costs of protecting it would prove to be very difficult and high, or would be politically inconvenient or hampering some economic projects.[63]

It could also help to improve access and simplify the communication of biodiversity results in the EU and other entities outside EU jurisdiction. Thanks to this, and in some way by strengthening the position of the Red List, other countries or regions would be inspired by similar measures.[64]

As is apparent from the analysis of the directives in question, despite their great importance, it must be concluded that they did not ensure the protection of biodiversity as is necessary. This is precisely the scope for the legislation adopted on the basis of the European Green Deal, namely to correct the shortcomings or to supplement the gaps that exist in these rules. In order to

[60] *Ibid,* p. 388–389.
[61] *Ibid.,* p. 389.
[62] IUCN: *How the Red List is Used, IUCN Red List*. Online: https://www.iucnredlist.org/about/uses (quoted 1 July 2022).
[63] AMOS, R.: *Assessing the Impact of the Habitats Directive: A Case Study of Europe's Plants*. In: Journal of Environmental Law, Vol. 33, Issue 2, March 2021, pp. 372. Online: https://doi.org/10.1093/jel/eqab006 (quoted 1 July 2022).
[64] *Ibid.*, p. 389–390.

comply with the EU Biodiversity Strategy for 2030, the relevant directives will also need to be clearly adapted.

To achieve EU Biodiversity Strategy for 2030, the EU has set aside about 100 sub-targets to help this. In 2021 alone, 19 sub-targets have been met, which is quite a good start in the upcoming sense. In the near future, however, the most attention is paid to the presentation of the proposal "Regulation on the restoration of nature", which raises high expectations as to whether it will manage to address the current shortcomings in the protection of biodiversity or to take its protection to a new level.

To conclude this section, according to STATISTICS for the European GREEN DEAL, it follows that in certain cases the Slovak Republic is achieving better results than the EU on average. If we look at the protection of forests, Slovakia is better than the European average with its 48.6% of forests on the total area of the country, while average area in EU is 42.3% (data for the year (2018).[65] However, if we look at the statistics presented directly by the Slovak Republic, according to the Report on Forestry in the Slovak Republic for 2020, the area of forests in 2018 in Slovakia accounted for 41.3% (in the case of counting so-called white areas up to about 46%) of the total area of the country.[66] Individual statistics at EU and Slovak level therefore differ, which ultimately is not the desired effect, and may cause unnecessary doubts as to whether or not the member state fulfils its obligations.

7.2 Protection of Biodiversity from the Perspective of International Law

Within the framework of the international regulation for the protection of biodiversity, there is a significant number of international multilateral treaties which create the main mechanism for its protection. Among the building blocks in this area can be included e.g. Convention on Biological Diversity (1992), the Convention on Wetlands of International Importance especially as Waterfowl Habitat (1971), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), or, for example, the Con-

[65] Eurostat: *Statistics for the European Green Deal*. Online: https://ec.europa.eu/eurostat/cache/egd-statistics/ (quoted 1 July 2022).

[66] Ministry of Agriculture and Rural Development of the Slovak Republic, National Forestry Centre: *Report on Forestry in the Slovak Republic 2020 — Green Report (abbreviated version)*. Bratislava: ExpresTlač, Bratislava, 2021, p. 9, ISBN: 978-80-8093-328-9.

vention on the Conservation of Migratory Species of Wild Animals (1979).[67] The vast majority of these conventions come from the last third of the 20th century, so the interest in protecting biodiversity is not a complete novelty within the international community.

However, with regard to the topic of this work, it is necessary to answer the question of what state the current international regulation of biodiversity is in and where it is heading. All of these conventions will not be analyzed, mostly the Convention on Biological Diversity. Although the Convention on Biological Diversity is from 1992, it is still the cornerstone of this area (mainly due to its framework nature), despite its frequent criticism. At the outset, it is worth mentioning the Kunming Declaration of October 2021, where the Conference of the Parties to the Convention on Biological Diversity (CBD COP-15) took place.[68] Despite the fact that it is a declaration, without any genuine legally binding nature, the commitments made at the conference through this declaration send a strong message across the international community.

Among the commitments made, which we perceive as the most significant, it is necessary to include the following:

- Ensure the development, adoption and implementation of an effective global post 2020 global biodiversity framework. This framework is intended to ensure the implementation of the necessary means within the meaning of the Convention on Biological Diversity and adequate monitoring, reporting and evaluation mechanisms to reverse the current reduction in biodiversity, so that by 2030 the conservation of biodiversity is set up in such a way that by 2050 the full implementation of the 2050 Vision on "Living in Harmony with Nature" will be possible.
- Actively strengthen the global environmental legal framework and strengthen environmental law at national level, as well as its enforcement.
- Multiply activities to reduce the negative impacts of human activity on the oceans in order to protect marine and coastal biodiversity, and

[67] Enviroportal: *International conventions*. Online: https://www.enviroportal.sk/dokumenty/medzinarodne-dohovory/5 (quoted 1 July 2022).

[68] Declaration from the High-Level Segment of the UN Biodiversity Conference 2020 (Part 1) under the theme: *"Ecological Civilization: Building a Shared Future for All Life on Earth"* (Kunming Declaration). October 13, 2021. Online: https://www.cbd.int/doc/c/df35/4b94/5e86e1ee09bc8c7d4b35aaf0/kunmingdeclaration-en.pdf (quoted 1 July 2022).

strengthen the resilience of marine and coastal ecosystems to climate change;
- Increase the provision of financial, technological and other support for developing countries necessary to implement post 2020 global biodiversity framework, all in accordance with the provisions of the Convention on Biological Diversity;
- Strengthen cooperation and coordination of activities in relation to current international environmental treaties, such as the United Nations Framework Convention on Climate Change, the United Nations Convention on Combating Desertification and Conventions related to the Protection of Biodiversity. Equally strengthen cooperation in relation to the 2030 Agenda for Sustainable Development and other international and multilateral processes in order to protect, maintain sustainable management and restore terrestrial, freshwater and marine biodiversity, all while contributing to sustainable objectives development.[69]

We can observe that many of these commitments are very vague and too general in nature, which will have to be further defined and clarified in order to achieve the objectives pursued. However, the position currently held by China must be seen positively. Despite being among the countries involved in the pollution of the planet and thus in damaging biodiversity to the greatest extent, it shows an intention to take the notional helm in shaping and promoting biodiversity conservation.[70] Above, we mentioned the commitment of the Contracting Parties to increase aid to developing countries. It was China that announced the creation of the so-called Kunming Fund for Biodiversity, to support biodiversity conservation in developing countries, investing $230m in the fund in question.[71] A continuation of the Conference of the Parties is due to take place in December this year, adopting the final picture

[69] Declaration from the High-Level Segment of the UN Biodiversity Conference 2020 (Part 1) under the theme: *"Ecological Civilization: Building a Shared Future for All Life on Earth"* (Kunming Declaration). October 13, 2021. Online: https://www.cbd.int/doc/c/df35/4b94/5e86e1ee09bc8c7d4b35aaf0/kunmingdeclaration-en.pdf (quoted 1 July 2022).

[70] Convention on Biological Diversity: *UN Biodiversity Conference's High-Level Segment sees creation of Kunming Biodiversity Fund, adoption of Kunming Declaration, building political impetus for adoption of ambitious post 2020 global biodiversity framework*, October 2021. Online: https://www.cbd.int/doc/press/2021/pr-2021-10-13-cop15-hls-en.pdf (quoted 1 July 2022).

[71] *Ibid.*

of the global framework for the protection of biodiversity.[72] These commitments need to be taken into account if we look back at previous "achievements", where, for example, the objectives set out at the 2002 Conference of the Parties with regard to reducing biodiversity loss have not been met, or if we are talking about Aichi targets that were also not successfully implemented from the global point of view (not just from the EU perspective).[73] For example, the Conference of the Parties, The 2010 Nagoya Summit (CBD COP-10), or its results, were seen as a great success in the history of the Convention.[74] Within the framework of this conference, the objectives themselves from Aichi were also conceived. At the last conference, however, it was stated within the framework of the Kunming Declaration that the 2011–2020 decade had seen some progress, but it was not sufficient to achieve the Aichi goals.[75] Many of these problems can be caused by both unrealistically set goals and a lack of political will.[76] Other authors, such as. Morgera et al., state that the reasons for the failure (e.g. in relation to CBD COP-2002) were facts such as insufficient scope of activities related to the implementation of the Convention, insufficient integration of biodiversity problems into policies and programmes in other areas, lack of attention dedicated to the main drivers causing loss of biodiversity or insufficient inclusion of biodiversity benefits and costs due to loss of biodiversity into economic systems and markets.[77]

The Convention on Biological Diversity is the most successful environmental convention in relation to a number of Contracting Parties (196 Con-

[72] *UN Biodiversity Conference (CBD COP 15) (Part 2)*, IISD. Online: https://sdg.iisd.org/events/un-biodiversity-conference-cbd-cop-15-part-2/ (quoted 1 July 2022).

[73] MORGERA, E., TSIOUMANI, E.: *Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity*, University of Edinburgh School of Law Working Paper, No. 2011/21, 21 November 2011, p. 8. Online: http://dx.doi.org/10.2139/ssrn.1914378 (quoted 1 July 2022).

[74] *Ibid.*, p. 31.

[75] Declaration from the High-Level Segment of the UN Biodiversity Conference 2020 (Part 1) under the theme: *"Ecological Civilization: Building a Shared Future for All Life on Earth"* (Kunming Declaration). October 13, 2021. Online: https://www.cbd.int/doc/c/df35/4b94/5e86e1ee09bc8c7d4b35aaf0/kunmingdeclaration-en.pdf (quoted 1 July 2022).

[76] BIRNIE, P., BOYLE, A., REDGWELL, C.: *International Law & the Environment*, New York: Oxford University Press, 2009, p. 649, ISBN: 978-0-19-876422-9.

[77] MORGERA, E., TSIOUMANI, E.: *Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity*, University of Edinburgh School of Law Working Paper, No. 2011/21, 21 November 2011, p. 8. Online: http://dx.doi.org/10.2139/ssrn.1914378 (quoted 1 July 2022).

tracting Parties).[78] Paradoxically, we do not have to perceive this only positively. The Convention is more of a framework nature, as is apparent from its provisions. With regard to its framework nature, there is a given scope for its further development through annexes or protocols. It builds on existing treaties at that time, and at the same time creates a certain context in which these contracts (often aimed at protecting specific species or habitats) are to be interpreted and implemented.[79] At the time of its inception, it indicated a deflection from the existing environmental protection regulation, putting the balance between protection and sustainable development at the forefront. It introduced new legal concepts such as biodiversity, ecosystems and biotechnology.[80] The efforts to interfend indigenous peoples or developing states must also be highlighted. The Convention also emphasizes the international cooperation of individual Contracting Parties. What the Convention has most often been reproofed is its vague language, scope too wide, or insufficient normative text.[81] The obligations set out therein are often weakened by supplementary provisions or phrases. These are phrases such as *"as possible and as appropriate"*, *"predominantly"*, *"in particular"*, *"in accordance with its particular conditions and capabilities"*, etc.[82] Here we go back to the argument that a number of Contracting Parties has not only a positive impact. The provisions thus broadly and vague, on the one hand, reflect often opposing views in negotiations between individual, many times polarized groups. Without the content thus conceived, the Convention would probably never have been created because States were reluctant to make clearer defined commitments or to shift clarification of the details of such commitments to further negotiations or national decision-making.[83] Therefore, as Birnie et al points out, it is important to focus on the implementation process rather than on the

[78] *List of Parties to the Convention on Biological Diversity*. Online: https://www.cbd.int/information/parties.shtml (quoted 1 July 2022).

[79] MORGERA, E., TSIOUMANI, E.: *Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity*, University of Edinburgh School of Law Working Paper, No. 2011/21, 21 November 2011, p. 3. Online: http://dx.doi.org/10.2139/ssrn.1914378 (quoted 1 July 2022).

[80] *Ibid*., p. 31.

[81] BIRNIE, P., BOYLE, A., REDGWELL, C.: *International Law & the Environment*, New York: Oxford University Press, 2009, s. 617, ISBN: 978-0-19-876422-9.

[82] *Convention on Biological Diversity*, June 5, 1992; 1760 U.N.T.S. 79, 143; 31 I.L.M. 818 (1992).

[83] BIRNIE, P., BOYLE, A., REDGWELL, C.: *International Law & the Environment*, New York: Oxford University Press, 2009, s. 617, ISBN: 978-0-19-876422-9.

textual part of the Convention, in order to assess its impact on biodiversity protection.[84]

In conjunction with the previous lines, therefore, the success of the Convention on Biological Diversity should be looked at through the process of implementation of individual provisions, the degree of implementation of individual strategies and programmes developed under its auspices, or by cooperation with other entities, namely States, international governmental and non-governmental organizations, scientists, etc. The Convention, including its protocols, successfully interconnects with other environmental conventions or the most important international organisations and bodies (in particular within the UN structures).[85]

However, what remains insufficient is the level of implementation of individual strategies and programmes, whose often excessively ambitious nature often undermines their fulfillment, hand in hand with the political motivations of the individual Contracting Parties. Although most of these plans and objectives (such as the Aichi targets) have not been met, partial progress also needs to be perceived positively, yet critically, in terms of the need for a real setting of individual objectives, and greater political will to pursue them, as well as raising awareness in within civil society and the corporate world.

Given the framework nature and generally conceived content, the Convention was (is) an appropriate framework or cover for other conventions in this area, often only of a sectoral nature, dealing with a specific issue. Indeed, the Convention itself deals with the protection of biodiversity as such. Consequently, the other conventions cover the protection of specific species or areas or of a certain category of animals and plants. As regards the assessment of their effectiveness, as noted by Birnie et al., it is impossible to assess the effectiveness of the wildlife protection regime from a cross-sectoral point of view, e.g. to evaluate the effect of conservation of one species through all the means applied to it or may have been applied to it within a range of conventions, in particular in the context of the general requirements of the Convention on Biological Diversity.[86] We do not fully share this opinion, on the

[84] *Ibid.*

[85] DIAS, B. F. S.: *The Slow but Steady Progress in the Implementation of the Biodiversity Agenda*, IUCN, 31 July 2021. Online: https://www.iucn.org/news/world-commission-environmental-law/202007/slow-steady-progress-implementation-biodiversity-agenda (quoted 1 July 2022).

[86] BIRNIE, P., BOYLE, A., REDGWELL, C.: *International Law & the Environment*, New York: Oxford University Press, 2009, s. 671, ISBN: 978-0-19-876422-9.

contrary, an assessment of the effectiveness of individual specialised conventions is possible, although it relies heavily on scientific data and research, and therefore interdisciplinary intersections are required here. However, the evaluation of efficiency is of unquestionable importance in achieving individual objectives with regard to biodiversity conservation.[87] Of course, we agree with the above view that it may be almost impossible to determine the effectiveness of a particular convention alone, but one cannot look at the application of that convention strictly individually, but in relation to other legal means of protection.

This can be seen, for example, in the implementation or assessment of the effectiveness of the Ramsar Convention (Convention on Wetlands of International Importance especially as Waterfowl Habitat). This is the oldest convention in the field of wetland protection, establishing the world's largest network of protected areas. In view of its lack of binding measures, its effectiveness has often been internationally questioned. From 2020, the study comes from the pen of E. Gaget et al., where the effectiveness of the Ramsar Convention in relation to the conservation of wintering waterfowl in the Mediterranean was assessed. Obtained data and prepared statistics (through so-called "International Waterbird Census") were able to evaluate the effectiveness of the Convention in a given area. Although a significant role has been identified by the network of individual areas for wintering migratory birds, only within the North Africa area (so called Maghreb) it has been found to have a positive effect on populations of these birds.[88]

In the remaining regions of the Mediterranean, the lack of use of the Ramsar Convention as a 'protective means' has been demonstrated. An important element here is the re-quality plan and management of the implementation, followed by its transformation into national regulation. This also results in the diversified use or the varied effectiveness of the Convention in individual areas. Often, wetlands under the auspices of the Ramsar Convention are poorly protected. The reasons for lack of protection vary depending on the regions. In the Middle East, these are often insufficient efforts of state

[87] GAGET, E., et. al.: *Assessing the effectiveness of the Ramsar Convention in preserving wintering waterbirds in the Mediterranean*. In: Biological Conservation, Vol. 243, 2020, p. 13, ISSN: 0006-3207. Online: https://www.sciencedirect.com/science/article/abs/pii/S0006320719315332?via%3Dihub (quoted 1 July 2022).

[88] GAGET, E., et. al.: *Assessing the effectiveness of the Ramsar Convention in preserving wintering waterbirds in the Mediterranean*. In: Biological Conservation, Vol. 243, 2020, p. 3, ISSN: 0006-3207. Online: https://www.sciencedirect.com/science/article/abs/pii/S0006320719315332?via%3Dihub (quoted 1 July 2022).

power or geopolitical situation in the region (armed conflicts, etc.).[89] However, as Birnie et al. points out, an appropriately set institutional structure and cross-sectoral cooperation increase efficiency (referring in particular to the Conference of the Parties, the Secretariat, the Standing Committee or the Financial regime of contributions).[90]

In many EU countries, the already existing strong EU legislation (Wild Bird Conservation and Habitat Conservation Directives) or strategies developed within the EU, (e.g. Natura 2000) has proven to be of a benefit. In certain aspects, EU legislation has reflected the requirements of the Ramsar Convention, helping to bridge its lack of binding measures. However, we are not talking about universal success, e.g. France lost 6% of its natural wetlands between 1975–2005.[91]

In this brief assessment of the two international conventions in the field of biodiversity protection, we outlined the positive, but also the pitfalls of international regulation. The lack of normativity, the vague of the text itself, or unrealistically set goals under the auspices of these conventions are often negatives on the side of the conventions themselves. On the part of the Contracting Parties, this is often a lack of political will (including in view of the high cost of measures) or shortcomings in the implementation processes and national regulation.

Conclusion

The protection of biodiversity is increasingly becoming an object of interest to the international community. Although the vast majority of the legislation (both EU and international) was adopted during the second half of the 20th century, over the last 50 years we have seen a loss of biodiversity in tens of percent of the overall scale. It follows that, despite the existence of legislation, we have not achieved the required protection of biodiversity from a global point of view, whether for reasons (legal) on the part of legislation or for reasons on the part of individual entities, especially countries of the

[89] *Ibid.*, p. 17.

[90] BIRNIE, P., BOYLE, A., REDGWELL, C.: *International Law & the Environment*, New York: Oxford University Press, 2009, s. 676, ISBN: 978-0-19-876422-9.

[91] GAGET, E., et. al.: *Assessing the effectiveness of the Ramsar Convention in preserving wintering waterbirds in the Mediterranean*. In: Biological Conservation, Vol. 243, 2020, p. 17, ISSN: 0006-3207. Online: https://www.sciencedirect.com/science/article/abs/pii/S0006320719315332?via%3Dihub (quoted 1 July 2022).

world. Since the 1990s, a number of action plans, strategies or programmes have been developed to strengthen biodiversity protection, but often lacked binding nature, or they had targets set unrealistically. As part of the analysis of the impact of the European Green Deal on the protection of biodiversity, it can be concluded that the framework and objectives set are ambitious, and even within two years of the initiation of the project, progress and real achievement of individual objectives can be clearly seen. We consider strengthening legislation in this area to be the main achievement so far, notably in the form of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). Under this regulation, the objective of achieving climate neutrality by 2050 is legally binding. High expectations are also raised by the proposal for a regulation on the restoration of nature, which is expected to be presented this summer (draft of the regulation), after a multiple postponement. The new legislation will strengthen the existing legislation on EU soil, presented in particular by the Directives on the conservation of wild birds or habitat conservation, and we hope to remedy the shortcomings of existing legislation. An analysis of international legislation through two of its representatives, the Convention on Biological Diversity and the Ramsar Convention, shows that, despite partial successes, the aforementioned factors are a strong brake in fulfilling the potential of individual international treaties. However, strong determination can be seen from the Conference of the Parties to the Convention on Biological Diversity held in October 2021 (and to continue in December this year), but must be treated cautiously, as past experience suggests that "commitments" made in non-binding declarations (such as The Kunming Declaration), often remain only on paper or in insufficient incorporation into practice. We have a positive view of the fact that even polluters such as China have shown an interest in participating in the majority in global biodiversity protection. We have already stated that the frequent denominator of failure was unrealistic, and overly ambitious targets. Assuming that states remain reluctant to take radical action in the light of the strategies and plans adopted, the planet may not provide us with extra time. The increasingly rapid destruction of the natural environment calls for increasingly radical measures, and from a certain point it will no longer be possible to fulfil them, given the irreversible destruction that humanity is slowly (ever faster) but surely heading towards.

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12.) *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.*

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16.) *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.*

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8 LEGAL ASPECTS OF A SUSTAINABLE PRODUCT POLICY IN EUROPEAN LAW

Tereza Fabšíková

Abstract

The legal regulation of products with a particular interest in environmental protection is an important part of EU law. The European Green Deal emphasizes the significance of a sustainable product policy as it has the potential to minimize negative environmental impacts of a product during its whole lifecycle. It also aims at reducing waste. The aim of the paper is to analyze the issue of sustainable product policy in European law, its historical aspects, current state and future anticipations with special focus on the new Proposal for a Regulation establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC as well as the Ecodesign and Energy Labelling Working Plan.[1]

Introduction

Probably the most important part of a sustainable product policy is the one concerning the initial stage of a product life cycle – the designing phase. The term 'ecodesign' is used for the approach to designing new products with regards to their environmental impacts during their production, functioning, usage and even when they are not used any longer.[2] Potential environmental impacts may be adjusted by the design and construction itself or by a proper choice of materials, energy sources, etc. In the broader sense, ecodesign may be viewed as an overall approach to product design. As such, it may be a completely voluntary tool of environmental protection[3] and designers may decide to create in such a manner freely. Many of them have already done so,

[1] The presented article was created under the Charles University research project Cooperatio/LAWS.

[2] REMTOVÁ, K.: *Ekodesign*. Ministerstvo životního prostředí, Praha, 2003, p. 7, ISBN: 80-7212-230-4.

[3] For more information about the division of environmental protection tools in environmental law see: DAMOHORSKÝ, M a kol.: *Právo životního prostředí*, C. H. Beck, 2010, p. 36–37, ISBN: 978-80-7400-338-7.

as this topic is much more discussed in society than it used to be.[4] However, when ecodesign is tackled from a legal point of view, an analysis of legal norms is necessary. Ecodesign must then be seen primarily as a set of rules that apply to products, requiring them to comply with some standards, parameters, conditions etc.

The most significant legal act in connection to ecodesign is still the 'ecodesign directive',[5] but it is to be replaced by a new complex ecodesign regulation soon. The proposal of this new regulation was presented in spring of 2022. Based on the 'ecodesign directive' many other regulations have also been adopted. Besides the binding legal acts, of great significance for the approach to ecodesign in the EU are conceptual documents – 'ecodesign working plans'. Already four working plans[6] have been adopted so far, the fourth and newest one in 2022. The aim of this article is to examine the new documents of binding and non-binding nature and, most importantly, consider the contemporary perspective on legal regulation of ecodesign in European law and its relations to a sustainable product policy.

8.1 Ecodesign as a Basic Part of a Sustainable Product Policy

When discussing the EU sustainable product policy, the EU Ecolabel may also be mentioned and, according to the New Circular Economy Action Plan,[7] the EU GPP may be perceived as a part of it as well.[8] These are both interesting tools, but of a voluntary nature, and so their impact is limited.[9] The EU Ecolabel is an important means of consumers' informing and so is also a little intertwined with ecodesign. Nevertheless, ecodesign is the most important tool of a sustainable product policy because of the binding nature of

[4] More on this topic: FABŠÍKOVÁ, T.: *Aktuální vývoj evropské právní úpravy v oblasti ekodesignu výrobků*, In: *AUC Iuridica*, Vol. 65, No. 3, 2019, p. 71, ISSN: 0323-0619.

[5] *Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products. Hereinafter referred to as the 'Ecodesign directive'.*

[6] These were working plans for years 2009-2011, 2012-2014, 2016-2019 and the new for the period of 2022-2024. Compare also: *Communication from the Commission Ecodesign and Energy Labelling Working Plan 2022-2024* 2022/C 182/01 C/2022/2026, p. 2.

[7] *Communication from the Commission to the European Parliament, the Council, the European Economic and Socila Committee and the Committee of the Regions. A new Circular Economy Action Plan For a cleaner and more competitive Europe*. COM/2020/98 final. Hereinafter referred to as the 'New Circular Economy Action plan'.

[8] *New Circular Economy Action Plan*, p. 4.

[9] *Ibid.*

product-specific regulations and because of the significance of the designing phase for the future impacts of products. According to the European documents, more than 80% of the future effects of a product may be adjusted in the initial designing phase.[10]

Some shifts in the legal approach to ecodesign are to be found in European law since 2005, when the issue of ecodesign was regulated in a more complex way by a directive for the first time. The first ecodesign directive[11] was focused on the energy efficiency in connection to such products that are really energy-using, not energy related and so the scope of the directive was very limited. Lately, after the adoption of the new ecodesign directive in 2009, also products related to the energy consumption were included. The scope of the directive was therefore broadened, allowing it to cover for example insulating materials or water taps.[12] With stronger public attention brought to the topic of circular economy, discussion on a broader approach to ecodesign even in law appeared, strengthened in 2015 after the adoption of the Circular Economy Action Plan.[13] In connection with the scope of the direction, opinions that some rules shall apply also to some other products occurred.

As is apparent from the title of the 'ecodesign directive' — directive 'establishing a framework for the setting of ecodesign requirements for energy-related products', the idea of ecodesign in law was first narrowed into the concept of energy efficiency, and so the legal approach to the ecodesign in fact equals energy efficiency. An exemption is the reasoning of the directive, which, in its point 13, emphasizes the product life cycle.[14] Besides the

[10] See for example: European Commission: *Ecodesign Your Future*, p. 3. Online: https://op.europa.eu/o/opportal-service/download-handler?identifier=4d42d597-4f92-4498-8e1d-857cc157e6db&format=pdf&language=en&productionSystem=cellar&part= (quoted 1 July 2022). Also the *New Circular Economy Action Plan*, p. 3. *Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'*, p. 13.

[11] *Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council.*

[12] FABŠÍKOVÁ, T.: *Aktuální vývoj evropské právní úpravy v oblasti ekodesignu výrobků*. In: AUC Iuridica, Vol. 65, No. 3, 2019, p. 70, ISSN: 0323-0619.

[13] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commitee and the Committee of the Regions Closing the loop – An EU action plan for the Circular Economy,* COM/2015/0614 final. Hereinfter referred to as 'Circular Economy Action Plan'.

[14] FABŠÍKOVÁ, T.: *Požadavky na ecodesign výrobků z pohledu národní a unijní legislativy*. In: Právo v podnikání vybraných členských států Evropské Unie – sborník příspěvků k X. roč-

framework directive, other horizontal measures also exist[15] – covering energy labelling,[16] self-regulation measures[17] and standby/off mode consumption.[18] Many regulations were adopted based on the framework ecodesign directive that set some criteria regarding mainly energy performance of different types of products. Currently, 31 specific product groups are regulated.[19] As aforementioned, ecodesign comprises, by the nature of the matter, more aspects than just energy efficiency. Only partly related to energy efficiency is the issue of material usage and other resources usage – and as the economy shall be circular, it is indispensable to think about the possibilities for reuse of products, recycling, material recovery etc.

The legal approach to ecodesign in EU law may be examined on three levels: working plans as multiannual conceptual documents; framework legislation and product-specific measures.[20] As was already said, the ecodesign directive and especially the product-specific measures were mainly focused on the issue of energy efficiency. A very important shift in the approach to ecodesign in EU legislation came with the conceptual document – working plan. The Ecodesign Working Plan for years 2016–2020, strongly affected by the concept of circular economy, presented a very new emphasis on material efficiency in product ecodesign regulation. A discussion about the revision

níku mezinárodní vědecké konference, 1. vydání, Praha: TROAS s. r. o., 2018, p. 65–66, ISBN: 978-80-88055-04-4.

15 European Commission: *Overview of existing EU Ecodesign, Energy Labelling and Tyre Labelling Measures*, March 2022. Online: https://ec.europa.eu/info/sites/default/files/energy_climate_change_environment/summary_overview_of_ed-el_measures_v3.pdf (quoted 1 July 2022).

16 *Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU.*

17 *Commission Recommendation (EU) 2016/2125 of 30 November 2016 on guidelines for self-regulation measures concluded by industry under Directive 2009/125/EC of the European Parliament and of the Council.*

18 *Commission Regulation (EC) No 1275/2008 of 17 December 2008 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for standby and off mode electric power consumption of electrical and electronic household and office equipment.*

19 European Commission: *Overview of existing EU Ecodesign, Energy Labelling and Tyre Labelling Measures*, March 2022. Online: https://ec.europa.eu/info/sites/default/files/energy_climate_change_environment/summary_overview_of_ed-el_measures_v3.pdf (quoted 1 July 2022).

20 European Economic and Social Committee: *Regulation on Ecodesign for Sustainable Products*, 29 June 2022, p. 5. Online: https://www.eesc.europa.eu/sites/default/files/files/regulation_on_ecodesign_for_sustainable_products.pdf (quoted 1 July 2022).

of the framework directive also occurred[21] but finally it seems that it shall be rather replaced by a completely new regulation. During the last few years, however, some characteristics of products other than energy efficiency have already started to be regulated by the EU law.[22] Also, some other preparatory works were carried out during the last period in this regard but not a clear way how to regulate these aspects universally in various products has been found so far.[23] It is important to note, however, that the new product specific measures adopted in 2019 already include some requirements regarding also other aspects of ecodesign, as for example the obligatory availability of spare parts.[24]

8.2 The New Ecodesign Working Plan

Important documents focusing on circular economy in the EU have already recognized the significance of the designing phase of products for circular economy. The new Circular Economy Action Plan[25] emphasizes this importance again.

The most important conceptual documents in this field are however ecodesign working plans. The new one, adopted in spring 2022 and titled 'The ecodesign and energy labelling working plan',[26] seems to be little less

[21] DALHAMMAR, C.: *Promoting Energy and Resource Efficiency through the Ecodesign Directive*. In: Scandinavian Studies in Law, 2014, Vol. 59, p. 158, ISSN: 0085-5944.

[22] BUNDGAARD, A. et al.: *From energy efficiency towards resource efficiency within the Ecodesign Directive*. In: Journal of Cleaner Production, 2017, Vol. 144, p. 359–360, ISSN: 0959-6526.

[23] FABŠÍKOVÁ, T.: *Aktuální vývoj evropské právní úpravy v oblasti ekodesignu výrobků*. In: AUC Iuridica, Vol. 65, No. 3, 2019, p. 73, ISSN: 0323-0619.

[24] See *Commission Regulation (EU) 2019/2024 of 1 October 2019 laying down ecodesign requirements for refrigerating appliances with a direct sales function pursuant to Directive 2009/125/EC of the European Parliament and of the Council; Commission Regulation (EU) 2019/2022 of 1 October 2019 laying down ecodesign requirements for household dishwashers pursuant to Directive 2009/125/EC of the European Parliament and of the Council amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EU) No 1016/2010*. See also POLVERINI, D.: *Regulating the circular economy within the ecodesign directive: Progress so far, methodological challenges and outlook*. In: Sustainable Production and Consumption, Vol. 27, p. 1114–1115.

[25] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Comitee and the Commitee of the Region. A new Circular Economy Action Plan – For a cleaner and more competitive Europe*. Hereinafter referred to as The new Circular Economy Action Plan.

[26] *Communication from the Commission Ecodesign and Energy Labelling Working Plan 2022–2024,* 2022/C 182/01. Hereinafter referred to as: the Ecodesing Working Plan 2022–2024.

focused on other aspects of ecodesign different from energy efficiency than the previous one, which claimed the new approach to ecodesign with special emphasis on material efficiency[27] and in this regard was quite groundbreaking.[28] However, it is also important to note that the new working plan must be read with the knowledge that a new regulation on ecodesign is to be adopted soon (currently in proposal stage), emphasizing all the other aspects of ecodesign as well. Working plans, however, shall even after the adoption of the new regulation serve as important documents that identify and mark the most urgent issues.

In the new working plan, it is mainly claimed that the efforts to incorporate features important for ecodesign in a broader sense into the product ecodesign regulation will continue. In connection to this, it shall be noted that the measures from 2019 (touching domestic and commercial refrigerators, washing machines, dishwashers, electronic displays including televisions, light sources, power transformers and welding equipment[29]) that already includes some features related to circular economy are mentioned. The issues of (i) recycled content; (ii) durability, firmware, software and (iii) scarce, environmentally relevant and critical raw materials[30] are recognized as the most crucial ones in the future period, quite in line with the previous ecodesign action plan.

It is also mentioned that horizontal standards were finished by the European Committee for Standardisation and the European Committee for Electrical Standardisation. These norms cover the issues of durability, recyclability or reparability and may be a basis for regulation of the material efficiency of some products.[31] The newly established repair score system is introduced as being now under examination for future application in the area of smartphones or tablets.[32]

[27] *Communication from the Commission Ecodesign Working Plan 2016-2019,* COM/2016/0773 final.

[28] FABŠÍKOVÁ, T.: *Aktuální vývoj evropské právní úpravy v oblasti ekodesignu výrobků*. In: AUC Iuridica, Vol. 65, No. 3, 2019, p. 70, ISSN: 0323-0619.

[29] POLVERINI, D.: *Regulating the circular economy within the ecodesign directive: Progress so far, methodological challenges and outlook*. In: Sustainable Production and Consumption, Vol. 27, p. 1114–1115, ISSN: 2352-5509.

[30] *The Ecodesing Working Plan 2022-2024*, p. 7.

[31] *Ibid.*

[32] *Ibid.*

8.3 The New Ecodesign Regulation

Preparation of a proposal for a Regulation on Ecodesign for Sustainable Products (ESPR)[33] is a part of the Circular Economy Package, alongside with EU Strategy for Sustainable and Circular Textiles, Proposal for a revision of the Construction Products Regulation, Proposal to Empower Consumers in the Green Transition, Chapeau Communication 'on making sustainable products the norm' and the already discussed Ecodesign and Energy Labelling Working Plan 2022–2024.[34]

The newly proposed regulation on ecodesign is to substitute the contemporary directive on ecodesign. Two very significant changes are presented in the proposal. First, the scope of the regulation will be broader as it will apply to all products with some exemption listed in the text, not only to energy consuming appliances. The products that will not fall within the regulation are mainly food, feed, medicinal and veterinary medicinal products, living plants, animals, micro-organisms, products of plants and animals relating directly to their future reproduction and products of human origin.[35] Secondly, it will focus on more aspects of ecodesign than the ecodesign directive. As previously stated, the directive focused primarily on product energy efficiency, with little mention of other topics related to the circular economy, such as reparability or material reuse. In some cases, chemical safety has also been included in ecodesign regulation (mercury in household lamps),[36] which corresponds with the new proposal. The approach to ecodesign according to the new regulation shall be more complex, covering more aspects. The background for it is explained in a very detailed manner in quite long reasoning of the regulation.

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[33] *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC*, COM/2022/142 final. Hereinafter referred to as ESPR proposal.

[34] European Economic and Social Committee: *Regulation on Ecodesign for Sustainable Products*, p. 9.

[35] See Article 1 (2) of the ESPR proposal.

[36] Especially the Commission Regulation (EC) No 244/2009 of 18 March 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for non-directional household lamps includes requirements on the content and emmissions of mercury. See also FABŠÍKOVÁ, T.: *Požadavky na ecodesign výrobků z pohledu národní a unijní legislativy*. In: Právo v podnikání vybraných členských států Evropské Unie – sborník příspěvků k X. ročníku mezinárodní vědecké konference, 1. vydání. Praha: TROAS s. r. o., 2018, p. 66, ISBN: 978-80-88055-04-4.

In the proposed article 5, the aspects of ecodesign that shall be subject to subsequent legal regulation are listed. Conditions shall be created on aspects regarding durability, reliability, reusability, upgradability, reparability, possibility of maintenance and refurbishment, presence of substances of concern, energy use or energy efficiency, resource use or resource efficiency, recycled content, possibility of remanufacturing and recycling, possibility of recovery of materials, environmental impacts, including carbon and environmental footprint and expected generation of waste materials.[37]

The proper legal regulation of ecodesign in a broader sense is a very complicated issue, as is seen from previous preparatory works on ecodesign.[38] There are some issues arising from the very nature of product existence, like that some requirements may conflict very easily — the potential conflict of durability vs. recyclability may be mentioned. Another issue is the one connected with the prolongation of products' lives on the one hand and technological development on the other. As technological development moves forward, it is clear that many products may become obsolete quite quickly.[39] These issues are described in theory and sometimes referred to as 'ecodesign dilemmas'.[40] When regulations are created, these potential conflicts must be kept in mind.

Some criteria for when requirements for ecodesign may be requested are laid down in Article 5 of the ESPR proposal. The most important and probably also most problematic ones are those of functionality, meaning that there shall be no significant negative impacts on the functionality of products from the users´ point of view,[41] and affordability, meaning that there shall not be any significant negative impact on consumers' availability to afford some products. When assessing changes in affordability, access to second-hand products or durability shall be considered.[42] These criteria seem to be complicated in determining which impacts are negative in a way that is not acceptable, and which are yet tolerable.

[37] See Article 5 (1) of the ESPR proposal.

[38] The Ecodesign Working Plan 2022-2024, p. 4–5.

[39] FABŠÍKOVÁ, T.: *Aktuální vývoj evropské právní úpravy v oblasti ekodesignu výrobků*. In: AUC Iuridica, Vol. 65, No. 3, 2019, p. 70, ISSN: 0323-0619.

[40] PRENDEVILLE, S. M. et al.: *Uncovering ecodesign dilemmas: A path to business model innovation*. In: Journal of Cleaner Production, 2017, Vol. 143, p. 1337–1339, ISSN: 0959-6526.

[41] See Article 5 (1) of the ESPR proposal.

[42] *Ibid.*

As is also mentioned in the conceptual documents described above, some products may be more suitable to be regulated by ecodesign legislation. Article 16 of the ESP regulation tackles the issue of prioritization giving some criteria that shall be considered by the Commission when deciding which products shall be regulated. Mainly these are: the potential contribution to achieving climate, environmental and energy efficiency objectives; the potential for improving the aspects of products that fall within the scope of the regulation (described above – reparability, reusability, …) or the value of sales and trade of the product within the Union.[43]

Some completely new ideas are also incorporated in the ESP regulation proposal, mainly supervision over the destruction of unsold products.[44] The aim in this area is to gather the information about the number of unsold products determined for discarding and the reasons for it and potentially to prepare some new measures. Subsequently, European Commission shall be on the basis of ESPR empowered to adopt acts with the aim of prohibiting destruction of products in cases where such actions have significant environmental impact.[45]

The new proposal also includes a concept of digital product passports. A data carrier related to the digital product passport shall be placed on a product and the required information shall be available through it then. The emphasis on the availability of information is evident from all the texts related to ecodesign and sustainable product policy. It is based on the same idea as ecolabelling schemes – that the more informed consumer (buyer) will opt for the more environmentally friendly choice more likely.[46] When information is required, it may probably also lead the producers to focus their attention on the aspects etc. Information requirements are proposed in Article 7. All products must comply with the requirements related to the product passport and to substances of concern. The information that shall be included in the passport are set in Annex III of the proposal in more detail.[47]

[43] *Ibid.,* Article 16 of the ESPR proposal.

[44] *Ibid.,* Article 20 of the ESPR proposal.

[45] *Ibid.,* Article 20 (3) of the ESPR proposal.

[46] FABŠÍKOVÁ, T.: *Normativní rámec environmentálního řízení obchodních korporací. In Právo v podnikání vybraných členských států Evropské Unie.* In: Právo v podnikání vybraných členských států Evropské Unie – sborník příspěvků k IX. ročníku mezinárodní vědecké konference, 1. vydání. Praha: TROAS s. r. o., 2017, p. 53, ISBN: 978-80-88055-03-7.

[47] See: European Commission: *Annexes to the Commission proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC*, Brussels, 30 March

The proposal also presents the idea of an Ecodesign forum being establish. The Ecodesign forum shall be an expert group that shall participate in preparing new ecodesign requirements and assessing the effectiveness of the market surveillance mechanisms.[48]

Conclusion

The approach to sustainable product legislation changes in the European Union in reaction to many factors. The current state is that mainly some groups of energy related products are regulated, with the aim of improving their energy efficiency primarily and in some cases also other factors. After 2015, when the Circular Economy Action Plan was adopted, the idea of broadening the concept of ecodesign even in legislative acts strengthened. Some aspects other than energy efficiency have started to be regulated, such as for example reparability and spare parts availability. The continual shift in the approach to ecodesign in EU law from almost strictly just energy efficiency towards material and resource efficiency is happening. The newly proposed ESP regulation, which shall replace the framework ecodesign directive, seems to cover the concept of ecodesign in a more complex way. It brings many new ideas as for example the establishing of Ecodesign forum, product passports or supervision over unsold products, and mainly it presents two very significant changes – the number of products that may be subjected to ecodesign regulation will grow and also more aspects of products may be regulated. The ESPR proposal does not create some rules for different characteristics of products in a detailed manner; its purpose is primarily to provide a framework for future regulation of many aspects of ecodesign. In fact, it opens the way for adoption of new acts related to the ecodesign of all products, not only those related to energy consumption. However, what kind of new measures will be really adopted based on the ESP regulation is yet to be seen. As the issue of regulation of more product features is really a challenging one due to many factors such as technological development, trends, conflicting requirements etc., it will be very interesting to observe which new measures regarding material efficiency and other similar aspects will be really consented if the ESPR proposal will be approved and become effective.

2022, COM(2022) 142 final. Online: https://environment.ec.europa.eu/system/files/2022-03/COM_2022_142_1_EN_annexe_proposition_part1_v4.pdf (quoted 1 July 2022).

[48] See Article 17 of the ESPR proposal.

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11.) European Commission: *Annexes to the Commission proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC*, Brussels, 30 March 2022, COM(2022) 142 final. Online: https://

environment.ec.europa.eu/system/files/2022-03/COM_2022_142_1_EN_annexe_proposition_part1_v4.pdf (quoted 1 July 2022).

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9 EUROPEAN LEGAL PERSPECTIVE ON ARTIFICIAL INTELLIGENCE IN THE CONTEXT OF THE EUROPEAN GREEN DEAL

Lucia Bakošová

Abstract

Artificial Intelligence (AI) is becoming to play a significant role in the current and future climate action. The use of AI may enhance climate change adaptation, mitigation, as well as prevention. On the other side, there are also several negative effects that may hinder the use of AI in climate action. The European Union (EU) is one of the most active international organisations in the area of climate change, as well as promotion and regulation of AI. Particular attention in the paper is dedicated to the European Green Deal, new growth strategy, which aims to transform the EU into a fair and prosperous society with a competitive economy. The aim of the paper is to analyse the preparedness of the EU legal framework in the context of the European Green Deal with regard to the use of artificial intelligence. Special attention is paid to the legal proposals and regulations on AI in climate action.[1]

Introduction

International community for over fifty years is gradually addressing the pressing issue of protection of the environment, sustainable development and climate change. The climate change has a far-reaching impact on numerous areas of our lives, as well as the "balanced" existence of ecosystems on Earth. The *International Panel on Climate Change Report*, published in 2022, states that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability.[2] Most notably, climate change has caused substantial damages, and in-

[1] The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)".

[2] Intergovernmental Panel on Climate Change: *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Working Group II contribution to the Sixth Assessment Report of the

creasingly irreversible losses, in terrestrial, freshwater and coastal and open ocean marine ecosystems, reduced food and water security, adversely affected physical health of people, livelihoods and key infrastructure globally, as well as contributed to humanitarian crises where climate hazards interact with high vulnerability.[3] Throughout the years, States, international organizations and other stakeholders are focusing on the development and incorporation of new technologies to achieve sustainable development goals and to address the climate change adaptation and mitigation. The *Glasgow Climate Pact*, adopted at the 2021 Glasgow Climate Change Conference (hereinafter "COP26"), calls upon Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition.[4] States at the COP26 recognized the importance of international collaboration on innovative climate action, including technological advancement, across all actors of society, sectors and regions, in contributing to progress towards the objective of the *United Nations Framework Convention on Climate Change* and the goals of the *Paris Agreement*.[5] Over time, it is confirmed that global issues, such as climate change are best addressed collectively. Although, there are several universal international organizations addressing the analysed issue, one of the most successful and progressive is the European Union (hereinafter "EU"). In the *2021 Survey on Climate Change*, European citizens identified climate change as the single most serious problem facing the world.[6] It is not surprising that the EU took a bold step in 2019, when the President of the

Intergovernmental Panel on Climate Change, 27 February 2022, p. 8. Online: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf (quoted 1 July 2022).

[3] *Ibid.*, p. 10–13.

[4] *The Glasgow Climate Pact*, Decision -/CP.26, advance unedited version, 13 November 2021, para. 20. Online: https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf (quoted 1 July 2022).

[5] *Ibid.*, para. 53.

[6] EU: *Special Barometer 513: Climate Change*, Brussels, 2021, p. 9, ISBN: 978-92-76-38399-4. Online: https://ec.europa.eu/clima/system/files/2021-07/report_2021_en.pdf (quoted 1 July 2022).

EU Commission Ursula von der Leyen introduced the *European Green Deal*, a new growth strategy to make Europe the first climate-neutral continent by 2050, at the same time boosting the economy, improving people's health and quality of life, caring for nature, and leaving no one behind. There are numerous means that may be used to achieve set goals. In the present paper we focus on the use of artificial intelligence (hereinafter "AI"), which is the subject of increased EU interest, not only from the environmental perspective. Particular attention is placed on AI systems and their impact on the achievement of European Green Deal goals, as well as relevant EU legislation, not only concerning the positive, but also negative effects of its use. Furthermore, the EU cooperates with many stakeholders in the analysed area, which has an impact on the future EU legislation, possibly even globally. The aim of the paper is to analyse the preparedness of the EU legal framework in the context of the European Green Deal, with regard to the use of AI. Special attention is paid to the legal proposals and regulations on AI in climate action.

9.1 European Green Deal – European Union as an Environmental Standards Setter?

The area of protection of the environment and climate change has not been one of the focus areas when the EU was established, nor in the early years of its existence. However, currently the EU can be characterised as one of the most active subjects of international law in the mentioned areas. The EU is a Party to numerous key international environmental treaties that address various aspects, such as biodiversity and nature,[7] climate change and ozone depletion,[8] desertification,[9] water and air pollution,[10] or environmental governance.[11] On the EU level, the basis of legal regulation regarding the environment is addressed in the Articles 191–193 of the *Treaty on the Function-*

[7] *Convention on Biological Diversity* (1992), *Ramsar Convention on Wetlands of International Importance* (1971), *Convention for the Conservation of Antarctic Marine Living Resources* (1980).

[8] *Vienna Convention for the Protection of the Ozone Layer* (1985), *The United Nations Framework Convention on Climate Change* (1992), *Paris Agreement* (2015).

[9] *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (1994).

[10] *Geneva Convention on Long-range Transboundary Air Pollution* (1979).

[11] *Espoo Convention on Environmental Impact Assessment* (1991), *Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters* (1998) and its *Protocol on Pollutant Release and Transfer Registers* (2009).

ing of the European Union (hereinafter "TFEU"), as well as Articles 3–5 of the *Treaty on European Union* (hereinafter "TEU"). In case of the latter, only in a general manner. Particular relevance has the Art. 3 (3) TEU, on the basis of which the Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.[12] The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[13] We argue that pressing climate-related actions are better achieved at the EU level than on a national level. The past international experience in climate change confirms that States are often too reluctant to adopt appropriate measures, especially since the international environmental law does not possess an effective monitoring or sanction mechanisms. In accordance with the Art. 191 (1) TFEU, Union policy on the environment shall contribute to pursuit of the following objectives: (i) preserving, protecting and improving the quality of the environment; (ii) protecting human health; (iii) prudent and rational utilisation of natural resources; (iv) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.[14] The following article defines the manner in which measures in the analysed area are to be taken through the EU institutions. The scope of the EU's actions is limited by the principle of subsidiarity and the requirement for unanimity in the Council in the fields of fiscal matters, town and country planning, land use, quantitative water resource management, choice of energy sources and structure of energy supply. General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure

[12] *Consolidated version of the Treaty on European Union*, 26 October 2012, OJ L. 326/13, Art. 3 (3).

[13] *Ibid.*, Art. 5.

[14] *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47, Art. 191.

and after consulting the Economic and Social Committee and the Committee of the Regions.[15] Indeed, the implementation of the international treaties to which the EU is a Party, and the abovementioned articles is done by secondary legislation. The EU policy has largely contributed to the diffusion and strengthening of environmental law and has allowed its harmonization at a relatively high standard among the EU Member States. The EU has also disseminated its rules far beyond its borders, in countries which are members of the European Economic Area, or by setting them as conditions that external actors must meet in order to obtain rewards or avoid sanctions in trade agreements or accession treaties or even more indirectly, by convincing other of their appropriateness.[16] However, its efforts have suffered from significant deficits. Clashing interests of Member States, some of which still heavily depend on coal, and industrial lobbies raising concerns about international competitiveness and jobs have constrained the EU's ambitions. Insufficient mechanisms for monitoring and compliance have handicapped the implementation of these policies.[17]

An important step towards climate neutrality of Europe has been taken on 11 December 2019, when the European Green Deal (hereinafter "EGD") was presented by the President of the European Commission, Ursula von der Leyen. EGD presents a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use. It also aims to protect, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environment-related risks and impacts.[18] The EU thus seeks to be a first mover in global regulatory competition around the green transition, but also wants to lead by example and diffuse its environmental norms. It can therefore be argued that the European

[15] *Ibid.*, Art. 192.

[16] MALJEAN-DUBOIS, S.: *Regional Organizations: The European Union*, In: RAJAMANI, L., PEEL, J. (eds.): The Oxford Handbook of International Environmental Law, Second Edition, Oxford: Oxford University Press, 2021, p. 650–665, ISBN: 978-0-19-884915-5.

[17] GRABBE, H., LEHNE, S.: *Climate Politics in a Fragmented Europe*, Brussels: Carnegie Europe, 2019, p. 1. Online: https://carnegieeurope.eu/2019/12/18/climate-politics-in-fragmented-europe-pub-80616 (quoted 1 July 2022).

[18] European Commission: *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal*, Brussels, 11 December 2019, COM(2019) 640 final, p. 2.

Commission seeks to capitalize on both the EU's normative and regulatory power. The agenda builds on the global momentum around the climate emergency, such as the warning issued by the Intergovernmental Panel on Climate Change in 2018 that the world needed to reach net zero emissions by 2050 to avoid a climate disaster, and the societal mobilization triggered by the Friday's for Future movement the same year.[19] The EGD also reflects on the UN Sustainable Development Goals that were adopted in 2015, particularly goal no. 7 – Ensure access to affordable, reliable, sustainable and modern energy for all; goal no. 11 – Make cities and human settlements inclusive, safe, resilient and sustainable; goal no. 13 – Take urgent action to combat climate change and its impacts; goal no. 14 – Conserve and sustainably use the oceans, seas and marine resources for sustainable development; and goal no. 15 – Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.[20] The EGD is not a law in itself, but a general policy strategy that outlines the ambitions and goals in different policy sectors. For its implementation, existing regulations and standards are and will be revised over the next few years and new laws and directives will be developed and implemented. There are eight key areas that make up the EGD:

1) Increasing the EU's climate ambition for 2030 and 2050;
2) Supplying clean, affordable, secure energy;
3) Mobilising industry for a clean and circular economy;
4) Building and renovating in an energy and resource efficient way;
5) A zero pollution ambition for a toxic-free environment;
6) Preserving and restoring ecosystems and biodiversity;
7) Farm to Fork: a fair, healthy and environmentally friendly food system;
8) Accelerating the shift to sustainable and smart mobility.

The mentioned areas can be divided into three main themes: (1) climate-related goals that focus on emission reductions, energy efficiency and clean energy; (2) environmental aims, linked to biodiversity, pollution and circularity; and (3) a healthy and sustainable food system, which combines envi-

[19] ECKERT, S.: *The European Green Deal and the EU's Regulatory Power in Times of Crisis*. In: Journal of Common Market Studies, Vol. 59, 2021, p. 81–82, ISSN: 1468-5965.

[20] For more detail on specific goal targets see: UN General Assembly: *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, p. 21–25. Online: https://www.refworld.org/docid/57b6e3e44.html (quoted 1 July 2022).

ronmental and health ambitions.[21] Due to the wide extent of areas that EGD targets, in the paper we focus only on the use of AI in the first area, namely the climate-related goals and on selected legal instruments and initiatives.

9.1.1 European Union's Proposals and Initiatives to Achieve Climate-Related Goals of the European Green Deal

To achieve the goals outlined in the EGD, it is necessary that appropriate initiatives and legal regulations are adopted. In March 2020, the European Commission introduced the *European Climate Law* (hereinafter "ECL") which establishes a framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law. It sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the *Paris Agreement*, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the *Paris Agreement*.[22] The ECL also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030.[23] The relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective, taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective.[24] The main actions included in the ECL are: (a) mapping out the pace of emission reductions until 2050 to give predictability to businesses, stakeholders and citizens; (b) developing a system to monitor and report on the progress made towards the goal; (c) ensuring a cost-efficient and socially-fair green transition. In accordance with Art. 6, the Commission shall assess by 30 September 2023, and every five years thereafter, the collective progress made by all Member States towards the achievement of the climate-neutrality objective.[25]

[21] Van ZEBEN, J.: p. 307 *The European Green Deal: The future of a polycentric Europe?* In: European Law Journal, Vol. 26, No. 5–6, 2022, p. 307, ISSN: 1468-0386. Online: https://onlinelibrary.wiley.com/doi/pdf/10.1111/eulj.12414 (quoted 1 July 2022).

[22] *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')*, 30 June 2021, OJ L 243, Art. 1.

[23] *Ibid.*, Art. 4.

[24] *Ibid.*, Art. 2 (2).

[25] *Ibid.,* Art. 6.

The same assessment will also apply to national measures on the basis of the integrated national energy and climate plans. Where the Commission finds, after due consideration of the collective progress assessed in accordance with Article 6 (1), that the measures of a Member State are inconsistent with the climate-neutrality objective set out in Article 2(1) or inconsistent with ensuring progress on adaptation as referred to in Article 5, it may issue recommendations to that Member State. Where recommendations are issued, the concerned Member State shall, within six months of receipt of the recommendations, notify the Commission on how it intends to take due account of the recommendations in a spirit of solidarity between Member States and the Union and between Member States.[26]

When we turn to other legally binding documents, the EU is currently working on the revision of its climate, energy and transport-related legislation under the so-called "Fit for 55 package" in order to align current laws with the 2030 and 2050 ambitions.[27] The package is a set of interconnected proposals and strategies on biodiversity, circular economy, zero pollution, sustainable and smart mobility, renovation wave, sustainable food, hydrogen, batteries, offshore renewable energy and others. It strengthens eight existing pieces of legislation and presents five new initiatives, across a range policy areas and economic sectors: climate, energy and fuels, transport, buildings, land use and forestry.[28]

[26] *Ibid.*, Art. 7.

[27] The initiative includes: the revision of the EU emissions trading system (EU ETS), including its extension to shipping, and a revision of the rules for aviation emissions and the establishment of a separate emissions trading system for road transport and buildings; a revision of the effort sharing regulation on member states' reduction targets in sectors outside the EU ETS; a revision of the land use, land-use change and forestry regulation on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry; an amendment of the regulation setting CO_2 emission standards for cars and vans; a revision of the renewable energy directive; a recast of the energy efficiency directive; a revision of the energy tax directive; a carbon border adjustment mechanism; a revision of the directive on the deployment of alternative fuels infrastructure; ReFuelEU Aviation for sustainable aviation fuels; FuelEU Maritime for a green European maritime space; a social climate fund; a revision of the energy performance of buildings directive; reducing methane emissions in the energy sector; a revision of the third energy package for gas.

[28] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, Brussels, 14 July 2021, COM(2021) 550 final, p. 3.

Further development in the analysed area has been achieved in June 2021, when the EU Strategy on adaptation to climate change was introduced, as one of the key obligations stated in the *EU Climate Law*. The new adaptation strategy will be implemented in an integrated manner with other EGD initiatives such as the Biodiversity Strategy, Renovation Wave, Farm to Fork Strategy, the Circular Economy and Zero Pollution Action Plans, Forest Strategy, Soil Strategy, Smart and Sustainable Mobility Strategy, and Renewed Sustainable Finance Strategy. The measures set out in the strategy include: (a) better gathering and sharing of data to improve access to and exchange of knowledge on climate impacts; (b) nature-based solutions to help build climate resilience and protect ecosystems; and (c) integration of adaptation in macro-fiscal policies.[29] In connection with the role of AI in the achievement of the EGD goals, one of the crucial aspects is gathering and sharing of data which is important not only in training of AI systems, but also in their use, since it may have a substantial impact on climate change. The Commission acknowledged that the digital transformation is critical to achieving the EGD adaptation objectives and that it will promote use of the latest digital technologies and climate services to underpin decision-making (for example remote sensing, smart weather stations, artificial intelligence and high performance computing).[30] In the upcoming years, the Commission will also promote common rules and specifications for the recording and collection of data from both the private and public sector on climate-related losses and physical climate risk, and support the central recording of this data from the public and private sector at EU level through its Risk Data Hub. Furthermore, the Commission will facilitate access to climate-related risk and losses data for stakeholders, which is especially important, given the fact that stakeholders are invaluable partners in the development and use of AI. The review of the INSPIRE Directive as part of the 'GreenData4All' initiative offers an opportunity to revise the legislation to cover environmental and climate related disaster loss data, extending the scope of public access. Climate-related disaster loss data could also be considered as high value datasets in future revisions of the implementing act of the Directive on open data and the re-use of public sector information. Similarly, data collected in public private part-

[29] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Forging a climate-resilient Europe – the new EU Strategy on Adaptation to Climate Change*, Brussels, 24 February, 2021 COM(2021) 82 final.

[30] *Ibid*., p. 5.

nerships will be made as accessible as possible.[31] The non-competitive nature of data makes it a candidate to be treated as public good, just as we treat scientific knowledge. Following on from the aforementioned, we propose the centralization of environmental data that could be used by AI systems. This would allow for more efficient access to a larger amount of data, as well as the avoidance of data duplication, while limiting the high costs associated with their acquisition and thus minimizing the impact on the environment.

Despite the fact that the EU adopted numerous initiatives, strategies and legal instruments to achieve the climate-related goals of the EGD, there is no specific instrument that would regulate the use of AI in this area. Therefore, it is essential to separately analyse the EU legal instruments regulating the development and use of AI and its overlap with the EGD climate-related goals.

9.2 The Use of Artificial Intelligence in Achieving the European Green Deal Goals

Before we turn to the role and particular use of AI in achieving the climate-related goals of the EGD and follow-up strategies and legislative proposals, it is necessary to point out one of its shortcomings and that is its definition. The term "artificial intelligence" or "AI" has numerous definitions within natural, technical and legal sciences. AI can be viewed from two interconnected perspectives. Firstly, AI can refer to research on "a cross-disciplinary approach to understanding, modeling, and replicating intelligence and cognitive processes by invoking various computational, mathematical, logical, mechanical, and even biological principles and devices."[32] In the words of *M. Minsky*, one of the founders of AI, it is "the science of making machines do things that would require intelligence if done by men."[33] AI is one of the prime examples of an interdisciplinary research area because it combines numerous and diverse disciplines like computer science, psychology, cognitive science, logic, mathematics, and philosophy.[34] Secondly, AI may also refer to the final

[31] *Ibid*., p. 6.

[32] FRANKISH, K., RAMSEY, W. M. (eds.): *The Cambridge Handbook on Artificial Intelligence*, Cambridge: Cambridge University Press, 2014, p. 7. ISBN: 978-0-521-87142-6.

[33] COPELAND, J.: *Artificial Intelligence: Philosophical Introduction*, New Jersey: Wiley-Blackwell, 1993, p. 1. ISBN: 978-0-631-18385-3.

[34] UNESCO: *Report of the World Commission on the Ethics of Scientific Knowledge and Technology on Robotics Ethics*, September 2017, SHS/YES/COMEST-10/17/2 REV, para. 38.

product of AI research: a machine or an artefact that embodies some form of 'intelligence', i.e., that is capable of 'thinking' or solving problems in a way similar to human thinking.[35] The same division remains as regards to the legal definition of AI. Almost every instrument regulating AI, legally binding or not, has its own understanding of the definition of AI. Although, the definitions of AI in most cases overlap, it creates many impediments, especially when AI is used internationally. The most common fears associated with an internationally legally binding definition of AI is that it either will be too narrow and many of the AI systems will not be regulated, or it will be too wide and it will encompass systems that do not present AI. Furthermore, as *Rayfuse* argues, regulating uncertain, unknown, and even unknowable futures requires flexibility, transparency, accountability, participation by a whole range of actors beyond the State, and the ability to obtain, understand, and translate scientific evidence into law, even while the law remains a force for stability and predictability.[36]

For the purposes of this paper, we refer to the definitions adopted at the EU level, namely by the High-Level Expert Group on AI in the *Ethics Guidelines for Trustworthy AI* and the definition within the proposal of *Artificial Intelligence Act*. According to the *Ethics Guidelines for Trustworthy AI*, AI systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal.[37] The proposal of the *EU Artificial Intelligence Act*, uses the term "artificial intelligence system" which is defined as "a software that is developed with one or more of the techniques and approaches listed in Annex I[38] and can, for a given set of human-defined objectives, generate

[35] *Ibid.*, para. 43.

[36] RAYFUSE, R.: *Public International Law and the Regulation of Emerging Technologies*. In: BROWNSWORD, R., SCOTFORD, E., YEUNG, K. (eds.): *The Oxford Handbook of Law, Regulation and Technology,* Oxford: Oxford University Press, 2017, p. 500–501, ISBN: 978-0-19-968083-2.

[37] High-Level Expert Group on Artificial Intelligence: Ethics Guidelines for Trustworthy AI, Independent High-Level Expert Group on Artificial Intelligence Set Up by the European Commission, 8 April 2019, Brussels, p. 36. Online: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2019/11-06/Ethics-guidelines-AI_EN.pdf (accessed on 8 November 2021).

[38] (a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning; (b) Logic- and knowl-

outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with."[39]

AI may be used in various ways in adaptation and mitigation of climate change and in achieving the objectives set out in the EGD. AI tools and applications, such as digital twins of the Earth,[40] will be indispensable if the EU is to achieve its objectives in terms of climate neutrality, overall lower consumption of resources, greater efficiency and a more sustainable EU in line with the *United Nations' 2030 Agenda for Sustainable Development*.[41] Regarding the goal of becoming a carbon-neutral continent by 2050, we point to the *Climate TRACE* project, where AI serves to improve the accuracy and transparency of global emission inventories. It combines data from more than 300 satellites and 11,000 sensors with AI algorithms to identify and quantify emission sources. The project focuses on emissions data associated with oil and gas production and refining, shipping and aviation, forest fires and rice-related emissions.[42] AI systems can model possible climate change impacts and maximise resource efficiency through smart grids and connected smart appliances.[43] For instance, AI system *Neuron,* an intuitive and fully customizable visualization tool, increases the energy savings of buildings, increases efficiency and optimizes operational workflows in the so-called intelligent buildings. Neuron uses 5G and Internet of Things sensors to collect real-time data from building equipment and systems. It then uses AI to analyse this data in real time to optimize and automate the operations per-

edge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems; (c) Statistical approaches, Bayesian estimation, search and optimization methods.

[39] *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, Brussels, 21 April 2021, 2021/0106(COD), art. 3.

[40] For instance, see the Digital Twin of Planet Earth project conducted by the European Space Agency. Online: https://www.esa.int/ESA_Multimedia/Images/2020/09/Digital_Twin_Earth (quoted 1 July 2022).

[41] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Fostering a European Approach to Artificial Intelligence*, Brussels, 21 April 2021, COM(2021) 205 final, Annex, p. 37.

[42] For more details see: Climate TRACE. Online: https://www.climatetrace.org/inventory (quoted 1 July 2022).

[43] For instance, see RTE. MAROT, A. et al.: *Learning to run a Power Network Challenge: A Retrospective Analysis*. In: Proceedings of Machine Learning Research, 2021, p. 112–132. Online: http://proceedings.mlr.press/v133/marot21a/marot21a.pdf (quoted 1 July 2022).

formed by the heating, ventilation and air conditioning systems, and then provides information on the building's performance to the building manager. Energy optimization modules have currently been used in 10 buildings in Hong Kong, resulting in 10–30% energy savings in each building.[44] Neural networks and smart algorithms, in particular, can also contribute to developing joint actions aimed at preserving the ecosystem's health and biological diversity, combat desertification, soil degradation and marine pollution.[45] Furthermore, it can also help monitor, model and manage environmental systems, whether it is illegal logging, water degradation, illegal fishing and poaching,[46] air pollution or the burden of farming.[47] AI has proved to be an useful tool in forecasts of extreme weather events and natural disasters.[48] For instance, *Kuzi* helps farmers in Africa to adapt to climate change by early warning of potentially dangerous locust outbrakes. The systems collect data on soil moisture, wind, humidity and temperature, vegetation indices, satellite imagery and local weather data, to make predictions about locus breeding sites and migration routes. Predictions can come up to three months before the infestation, which provides time to prevent, prepare, control and mitigate the effects of their proliferation.[49] AI systems may also be used in the "climate engagement". In attempting to reduce the psychological distance to climate impacts, and thus stimulate action without the need to wait for real

[44] Global Partnership on Artificial Intelligence, Climate Change AI and Centre for AI & Climate: Climate Change and AI: Recommendations for Government, November 2021, p. 87. Online: https://www.gpai.ai/projects/climate-change-and-ai.pdf (quoted 1 July 2022).

[45] LEAL FILHO, W. et al.: *Deploying artificial intelligence for climate change adaptation*, Technological Forecasting & Social Change, Vol. 180, 2022, p. 2, ISSN: 0040-1625.

[46] See for example: Mapping the Andean Amazon Project (MAAP). Online: https://www.maaproject.org/en/ (quoted 1 July 2022); CHUI, M. et al.: *Notes From the AI Frontier: Applying AI for Social Good*, McKinsey Global Institute, December 2018, p. 24–27. Online: https://www.mckinsey.com/~/media/mckinsey/featured%20insights/artificial%20intelligence/applying%20artificial%20intelligence%20for%20social%20good/mgi-applying-ai-for-social-good-discussion-paper-dec-2018.ashx (quoted 1 July 2022).

[47] UNESCO: *Artificial Intelligence for Sustainable Development: challenges and opportunities for UNESCO´s science and engineering programmes,* Working Paper, August 2019, p. 14. Online: https://unesdoc.unesco.org/ark:/48223/pf0000368028 (cited 1 July 2022).

[48] See for example: The BigEarthNet. Online: https://bigearth.net (quoted 1 July 2022); ALEMANY, S., BELTRAN, J., PEREZ, A., GANZFRIED, S.: *Predicting Hurricane Trajectories Using a Recurrent Neural Network*. In: Proceedings of the AAAI Conference on Artificial Intelligence, Vol. 33(01), 2019, p. 468–475. Online: https://doi.org/10.1609/aaai.v33i01.3301468 (quoted 1 July 2022).

[49] For more details see: Kuzi. Online: https://www.selinawamucii.com/kuzi/ (quoted 1 July 2022).

negative consequences, recent attempts have been made to visualize climate impacts by training adversarial networks on historical disaster imagery and then generate images of places that have yet to experience those impacts.[50] However, such use of AI has its legal and ethical implications, especially regarding the privacy of personal data and potential manipulation of humans behaviour.

Despite of the fact that AI can have a positive impact and help meet the objectives of EGD, there also serious challenges for the environment. The main issue is the energy consumption that is associated with the development and use of AI, algorithms and the processing of large amounts of data.[51] *Strubell et al.* noted that training a single AI model can emit as much carbon as five cars in their lifetime.[52] The production, service and final disposal of AI systems also require vast amounts of non-renewable materials and efficient e-waste management,[53] which is contradictory to the aims of the EGD and sustainable development. Furthermore, when addressing the potential of AI in climate-related goals, *Gailhofer et al.* pointed out that using AI techniques in Earth observation requires significant additional work for data preparation, the integration of physical principles into algorithms, the ground truthing of data to validate products and for the development of data sets to train AI algorithms, which is complex and time-consuming for Earth observation parameters. Currently, the lack of training data sets for Earth observation applications is a limiting factor in AI applications and the potential of AI in this area is considered largely untapped.[54] From the legal perspective, *Awad et al.*

[50] WALSH, T., EVATT, A. de WITT, C. S.: *Artificial Intelligence & Climate Change: Supplementary Impact Report*, 2020, p. 7–8. Online: https://www.oxfordfoundry.ox.ac.uk/sites/default/files/learning-guide/2019-11/Artificial%20Intelligence%20%26%20Climate%20Change_%20Supplementary%20Impact%20Report.pdf (quoted 1 July 2022).

[51] NESLEN, A.: *Here's how AI can help fight climate change*, World Economic Forum, 11 August 2021. Online: https://www.weforum.org/agenda/2021/08/how-ai-can-fight-climate-change/ (quoted 1 July 2022).

[52] STRUBELL, E., GANESH, A., McCALLUM, A.: *Energy and Policy Considerations for Deep Learning in Natural Language Processing*. In: *Proceedings of the 57th Annual Meeting of the Association for Computational Linguistics (ACL)*. Florence, Italy, July 2019, p. 3650. Online: https://arxiv.org/abs/1906.02243 (quoted 1 July 2022).

[53] LEAL FILHO, W. et al.: *Deploying artificial intelligence for climate change adaptation*, Technological Forecasting & Social Change, Vol. 180, 2022, p. 2, ISSN: 0040-1625.

[54] GAILHOFER, P., et al.: *The role of Artificial Intelligence in the European Green Deal*, Study for the special committee on Artificial Intelligence in a Digital Age (AIDA), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2021, p. 17, ISBN: 978-92-846-8049-8. Online: https://www.researchgate.net/profile/Peter-Gailhofer/publication/351747124_The_role_of_Artificial_Intelligence_

highlighted three aspects of AI that make it difficult for common regulatory approaches and policies to tackle negative externalities of AI. First, AI systems are often black boxes: it can be unclear how exactly they process their input to arrive at a decision, even to those who actually programmed them in the first place. Second, AI systems may be constantly learning and changing their perceptual capabilities or decision processes, outpacing human efforts at defining and regulating their negative externalities. Third, even when an AI system is shown to have made biased decisions, it can be unclear whether the bias is due to its decision process or learned from the human behaviour it has been trained on or interacted with.[55] These negative externalities of AI, pose specific and potentially high risks to the safety and fundamental rights that existing legislation is unable to address or in view of which it is challenging to enforce existing legislation.[56]

9.2.1 The European Union's Initiatives and Legal Framework on Artificial Intelligence

The EU is one of the main subjects of international law shaping the development, implementation, as well as legal and ethical framework on AI. The EU's ambition is to be the leading actor in AI, aiming to boost research, industrial capacity and ensure protection of human rights and fundamental freedoms. There are two areas on which the EU focuses, namely excellence in AI and trustworthy AI.[57] The beginning of the journey has started in 2018, when the EU Commission introduced the European AI strategy, which addressed the socio-economic aspects of increasing investment in research, innovation and AI capacity across the EU[58] and announced the set up of an ex-

in_the_European_Green_Deal/links/60a76a8aa6fdcc6d6262ea58/The-role-of-Artificial-Intelligence-in-the-European-Green-Deal.pdf (quoted 1 July 2022).

[55] AWAD, E. et al.: *Crowd sourcing Moral Machines*. In: Communications of the ACM, Vol. 63, No. 3, 2020, p. 48–55. Online: https://doi.org/10.1145/3339904 (quoted 1 July 2022).

[56] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Fostering a European Approach to Artificial Intelligence*, Brussels, 21 April 2021, COM(2021) 205 final, p. 3.

[57] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Fostering a European Approach to Artificial Intelligence*, Brussels, 21 April 2021, COM(2021) 205 final, p. 1 and 4.

[58] European Commission: *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Artificial Intelligence for Europe*, 25 April 2018, COM/2018/237.

pert group, the High-Level Expert Group on AI, representing a wide range of stakeholders tasked with the development of ethical guidelines on AI, as well as preparation of a set of recommendations for broader AI policy. One of the first documents adopted was the *Declaration on Cooperation on Artificial Intelligence*, where EU Member States agreed to cooperate on ensuring an adequate legal and ethical framework, building on EU fundamental rights and values, including privacy and protection of personal data, as well as principles such as transparency and accountability. In particular, to work towards a comprehensive and integrated European approach on AI to increase the EU's competitiveness, attractiveness and excellence in research and development in AI, and where needed review and modernise national policies to ensure that the opportunities arising from AI are seized and the emerging challenges are addressed. Furthermore, to ensure that humans remain at the centre of the development, deployment and decision-making of AI, prevent the harmful creation and use of AI applications, and advance public understanding of AI.[59] The EU, together with Member States, agreed on *Coordinated Plan on Artificial Intelligence*, that laid the foundation for policy coordination on AI and encouraged Member States to develop national strategies.[60] Since the end of 2018, the technological, economic and policy context on AI has considerably evolved. Accordingly, the Commission presented, in April 2021, a review of the coordinated plan. The reviewed *Coordinated Plan* calls on Member States and private sector to: (a) accelerate investments in AI technologies to drive resilient economic and social recovery facilitated by the uptake of new digital solutions; (b) act on AI strategies and programmes by implementing them fully and in a timely manner to ensure that the EU reaps the full benefits of first-mover adopter advantages; and (c) align AI policy to remove fragmentation and address global challenges.[61] In order to accelerate, act and align to seize opportunities of AI technologies and to facilitate the

[59] *Declaration on Artificial Intelligence Cooperation*, 10 April 2018, p. 3–5. Online: https://ec.europa.eu/jrc/communities/en/community/digitranscope/document/eu-declaration-cooperation-artificial-intelligence (quoted 1 July 2022).

[60] European Commission: *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Coordinated Plan on Artificial Intelligence*, 7 December 2018, COM(2018) 795.

[61] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Fostering a European Approach to Artificial Intelligence*, Brussels, 21 April 2021, COM(2021) 205 final, Annex, p. 2.

European approach to AI, the reviews Coordinated Plan puts forward four key sets of proposals for the EU and the Member States:

(1) Set enabling conditions for AI development and uptake in the EU;
(2) Make the EU the place where excellence thrives from the lab to the market;
(3) Ensure that AI works for people and is a force for good in society; and
(4) Build strategic leadership in high-impact sectors.[62]

Within the last point, particular attention is focused on the use of AI regarding the environment and climate, less polluting mobility and sustainable agriculture. AI technologies could primarily support the achievement of the EGD objectives through four main channels: (1) transition to a circular economy, e.g. by making production processes more efficient and less resource- and energy-intensive; (2) better setup, integration and management of the energy system and empowering businesses, public authorities and citizens to choose the most sustainable and efficient energy options; (3) decarbonisation of buildings, agriculture and manufacturing; and a more efficient management of transport flows in all modes: road, rail and air, thereby reducing congestion, facilitating inter-modality and by contributing to the rollout of electric self-driving vehicles in public and private transport; and (4) enabling completely new solutions that were not possible using other technologies.[63]

In April 2021, the European Commission published not only the reviewed *Coordinated Plan*, but also introduced a proposal for an AI regulation laying down harmonised rules applicable to the design, development and use of certain high-risk AI systems for the EU – the *Artificial Intelligence Act*. The Act presents a direct response to the *EU's White Paper on AI*, introduced in 2020, which concluded that the use of AI creates a number of specific high risks for which existing EU and national legislation is insufficient.[64] The *AI*

[62] (1) Bring AI into play for climate and environment; (2) Use the next generation of AI to improve health; (3) Maintain Europe's lead: Strategy for Robotics in the world of AI; (4) Make the public sector a trailblazer for using AI; (5) Apply AI to law enforcement, migration and asylum; (6) Make mobility safer and less polluting through AI; (7) Support AI for sustainable agriculture.

[63] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Fostering a European Approach to Artificial Intelligence*, Brussels, 21 April 2021, COM(2021) 205 final, Annex, p. 38.

[64] For instance, the General Product Safety Directive (2001/95/EC), the Machinery Directive (2006/42/EC), the General Data Protection Regulation (2016/679/EU); European Com-

Act is further analysed in the following chapter *9.2.1.1 The Artificial Intelligence Act*.

Current promotion of AI-driven innovation is closely linked to implementation of the European Data Strategy, including the recent proposal of the *Data Governance Act*. The European Data Strategy aims to create a single European data space where personal as well as non-personal data, including sensitive business data, are secure and businesses also have easy access to an almost infinite amount of high-quality industrial data, boosting growth and creating value, while minimising the human carbon and environmental footprint.[65] The strategy also plans a specific "Common Europe Green Deal Data Space" to support the EGD priority actions on climate change, circular economy, zero pollution, biodiversity, deforestation and compliance assurance. The "GreenData4All" and "Destination Earth" (digital twin of the Earth) initiatives present concrete actions in the analysed area. The "GreenData4All" will evaluate and possibly review the Directive establishing an Infrastructure for Spatial Information in the EU, together with the Access to Environment Information Directive. It will modernise the regime in line with technological and innovation opportunities, making it easier for EU public authorities, businesses and citizens to support the transition to a greener and carbon-neutral economy, and reducing administrative burden. The Commission will also roll out re-usable data-services on a large scale to assist in collecting, sharing, processing and analysing large volumes of data relevant for assuring compliance with environmental legislation and rules related to the priority actions set in the EGD. Furthermore, it will establish a common European data space for smart circular applications and initiate a pilot for early implementation of the data strategy in the context of the 'zero pollution ambition' to harvest the potential of an already data-rich policy domain with data on chemicals, air, water and soil emission, hazardous substances in consumer products, etc.[66]

The proposed regulatory framework on AI will also work in tandem with applicable product safety legislation and in particular the revision of the *Machinery Directive*. Equally, the framework is an addition to the EU Security

mission: *White Paper on Artificial Intelligence – A European approach to excellence and trust*, Brussels, 19 February 2020, COM(2020) 65 final, p. 11–15.

[65] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European strategy for data*, Brussels, 19.2.2020 COM(2020) 66 final, p. 4–5.

[66] *Ibid.*, p. 22 and 26–27.

Union strategy, the new cybersecurity strategy, the digital education action plan 2021–2027 and the recently proposed Digital Services Act and Digital Markets Act as well as the European Democracy Action Plan. Finally, the proposed framework will be complemented by legislation to adapt the EU liability framework, such as revising the *Product Liability Directive*, in order to address liability issues related to new technologies, including AI, and by a revision of the *General Product Safety Directive*.[67]

The use of AI is also highly interconnected with the EU Digital Strategy, whose aim is to achieve climate neutral, highly energy-efficient and sustainable data centres by no later than 2030. To meet this goal, the Commission will rely on a mix of existing instruments and reviews of existing legislation such as the *Ecodesign Regulation on servers and data storage products*;[68] the *EU Code of Conduct on Data Centre Energy Efficiency*;[69] the *EU Green Public Procurement criteria for data centres, server rooms and cloud services*; and the *Energy Efficiency Directive*, currently under review, which aims to set measures for the recovery of waste heat.

9.2.1.1 The Artificial Intelligence Act

The *Artificial Intelligence Act* (hereinafter "AI Act") represents the first attempt globally to horizontally regulate AI. The extraterritorial application of the *AI Act* and its likely demonstration effect for policymakers means that the AI Act will have a range of implications for the development of AI regulation globally, as well as efforts to build international cooperation on AI.[70] The Act lays down:

[67] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Fostering a European Approach to Artificial Intelligence*, Brussels, 21 April 2021, COM(2021) 205 final, p. 3.

[68] *Commission Regulation (EU) 2019/424 of 15 March 2019 laying down ecodesign requirements for servers and data storage products pursuant to Directive 2009/125/EC of the European Parliament and of the Council and amending Commission Regulation (EU) No. 617/2013*, OJ L 74.

[69] ACTON, M., BERTOLDI, P., BOOTH, J.: *2022 Best Practice Guidelines for the EU Code of Conduct on Data Centre Energy Efficiency*, Joint Research Centre Technical Report, 2022. Online: https://e3p.jrc.ec.europa.eu/publications/2022-best-practice-guidelines-eu-code-conduct-data-centre-energy-efficiency (quoted 1 July 2022).

[70] MELTZER, J., TIELEMANS, A.: *The European Union AI Act: Next steps and issues for building international cooperation*, Global Economy and Development at Brookings, May 2022, p. 1. Online: https://www.brookings.edu/research/the-european-union-ai-act-next-steps-and-issues-for-building-international-cooperation-in-ai/ (quoted 1 July 2022).

a) harmonised rules for placing on the market, putting into service and the use of AI systems in the Union;
b) prohibitions of certain AI practices;
c) specific requirements for high-risk AI systems and obligations for operators of such systems;
d) harmonised transparency rules for AI systems intended to interact with natural persons, emotion recognition systems and biometric categorisation systems, and AI systems used to generate or manipulate image, audio or video content;
e) rules on market monitoring and surveillance.[71]

The Commission proposes to ban completely AI systems that manipulate persons through subliminal techniques or exploit the fragility of vulnerable individuals, and could potentially harm the manipulated individual or third person; serve for general purposes of social scoring, if carried out by public authorities; or are used for running real time remote biometric identification systems in publicly accessible spaces for law enforcement purposes.[72] The *AI Act* focuses exclusively on the high-risk AI systems, which are defined as those that are part of a product falling under the EU product safety regulation or belong to a list of stand-alone high-risk AI systems laid down by the proposal, such as AI systems assessing the creditworthiness of individuals or used in the context of recruitment.[73] When it comes to the requirements for High-risk AI systems, Art. 9 requires that a risk management system be established, implemented, documented and maintained and it shall consist of a continuous iterative process run throughout the entire lifecycle of a high-risk AI system, requiring regular systematic updating.[74] The proposal also focuses on data and data governance, technical documentation of the high-risk AI systems, record-keeping, transparency and provision of information to users, accuracy, robustness ad cybersecurity. High-risk AI systems shall be designed and developed in such a way, including with appropriate human-machine interface tools, that they can be effectively overseen by na-

[71] *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending certain Union Legislative Acts*, Brussels, 21 April 2021, 2021/0106(COD), Art. 1. Online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206 (quoted 1 July 2022)
[72] *Ibid.*, Art. 5.
[73] *Ibid.*, Art. 6 (1).
[74] *Ibid.*, Art. 9.

tural persons during the period in which the AI system is in use.[75] Among the proposed obligations of providers of high-risk AI systems is to have a quality management system in place, to draw-up the technical documentation of the high-risk AI system and, *inter alia*, to ensure that the high-risk AI system undergoes the relevant conformity assessment procedure, prior to its placing on the market or putting into service.[76] As currently designed, for AI systems using a product safety component, Member States' national competent authorities (e.g., government agencies in charge of oversight, implementation, and enforcement of the regulation) will designate third-party notified bodies to conduct conformity assessments. Yet, for "stand-alone" high-risk AI systems, only industry self-assessment will be required.[77] The newly required conformity assessments turn out to be merely internal processes, not documents that could be reviewed by the public or a regulator.[78] According to Art. 21, providers of high-risk AI systems which consider or have reason to consider that a high-risk AI system which they have placed on the market or put into service is not in conformity with the proposed Regulation shall immediately take the necessary corrective actions to bring that system into conformity, to withdraw it or to recall it, as appropriate. They shall inform the distributors of the high-risk AI system in question and, where applicable, the authorised representative and importers accordingly.[79] Special provisions are proposed for product manufacturers, importers, distributors, and users of high-risk AI systems.[80] To enforce the new regulation, the EU will create a new European Artificial Intelligence Board (EAIB) comprised of the European Data Protection Supervisor, the Commission, and national supervisors,[81] which is similar to the General Data Protection Regulation's (GDPR) oversight mechanism. One concern with the EAIB cited by Rapporteur *Tudorache* is that it will lead to a fragmented enforcement landscape,

[75] *Ibid.*, Art. 14 (1).

[76] *Ibid.*, Art. 16.

[77] MELTZER, J., TIELEMANS, A.: *The European Union AI Act: Next steps and issues for building international cooperation*, Global Economy and Development at Brookings, May 2022, p. 4.

[78] MacCARTHY, M., PROPP, K.: *Machines Learn That Brussels Writes the Rules: The EU's New AI Regulation*, Lawfareblog, 28 April 2021. Online: https://www.lawfareblog.com/machines-learn-brussels-writes-rules-eus-new-ai-regulation (quoted 1 July 2022).

[79] *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending certain Union Legislative Acts*, Brussels, 21 April 2021, 2021/0106(COD), Art. 21.

[80] For particular obligations see Arts. 24–29.

[81] *Ibid.*, Art. 57.

where Member States vary in their capacity and willingness to enforce the *AI Act*. In the Parliament's Draft Report on AI Act, Rapporteurs *Tudorache* and *Benifei* agree on strengthening the enforcement role of the EAIB to complement national-level enforcement, though the exact mechanisms have yet to be determined.[82]

The proposal for the *AI Act* refers to environmental sustainability with respect to potential infringements of the right to a high level of environmental protection and the improvement of the quality of the environment including in relation to the health and safety of people. At least where human rights or clearly defined human interests are not simultaneously concerned, environmental risks remain outside of the scope of the binding norms of the proposal. More generally, the difficulties to assess and allocate risks triggered by AI, which may lead to environmental impacts as a result of several interacting causes and potentially in the long term, could pose an obstacle to a risk-based approach to regulation. As *Gailhofer et al.* argus, there is still a need for research on how and to what extent precautionary, risk-based regulation of algorithms can contribute to an effective regulation of complex, dispersed or cumulative environmental hazards.[83] The Climate Change AI, an international NGO, recommends changes in the provisions concerning classification rules for high-level risk AI systems and reporting requirements to collect data on greenhouse gas impacts.

First, it is recommended that the Act more explicitly involves climate change mitigation and adaptation in the classification rules for high-risk AI systems. In particular, more explicitly acknowledging environmental protection – including reduction of greenhouse gas emissions to mitigate climate change – as one of the fundamental rights that, if affected negatively by the AI system, trigger a high-risk classification. The Climate Change AI proposes that the Art. 7 of the *AI Act* shall read as follows: "The fundamental right

[82] European Parliament – Committee on the Internal Market and Consumer Protection, Committee on Civil Liberties, Justice and Home Affairs: *Draft Report on the proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts*, 20 April 2022, 2021/0106(COD); MELTZER, J., TIELEMANS, A.: *The European Union AI Act: Next steps and issues for building international cooperation*, Global Economy and Development at Brookings, May 2022, p. 4.

[83] GAILHOFER, P., et al.: *The role of Artificial Intelligence in the European Green Deal*, Study for the special committee on Artificial Intelligence in a Digital Age (AIDA), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2021, p. 37, ISBN: 978-92-846-8049-8.

to a high level of environmental protection enshrined in the Charter and implemented in Union policies should also be considered when assessing the severity of the harm that an AI system can cause, including in relation to the health and safety of persons and the ability to appropriately address climate change."[84] In connection to the Art. 7 (g), which addresses the impacts that are not easily reversible, the Climate Change AI recommends following wording: "the extent to which the outcome produced with an AI system is easily reversible, whereby outcomes having an impact on the health or safety of persons, or an environmental impact such as the ability of meeting greenhouse gas emission targets, shall not be considered as easily reversible."[85]

Regarding the transparency and reporting of climate-relevant data, it is recommended that the reporting requirements for high-risk AI systems are expanded to collect data on greenhouse gas impacts, including impacts through both computational energy use and the applications for which these systems are used. As an approach would leverage the opportunity of reporting requirements for high-risk AI systems to collect much-needed data for decision-making on decarbonization strategies.[86]

9.2.2 European Union's Cooperation with Stakeholders – The Climate Neutral Data Centre Pact

The EU is not only cooperating with its Member States, other international organizations, but also relevant stakeholders. It is important that stakeholders support the EU's initiatives regarding the aims of EGD, as well as initiatives and regulations regarding AI. In international law it is common that the majority of legislation addresses conduct done by subjects of international law. However, in the last decades, stakeholders have become an integral part of the drafting process of modern international law legislation. Their important role is highlighted by the fact that are directly involved in the development, use and service of AI and in sustainable development which is a cornerstone of todays international regulation. Due to the fact, that there is a limited number of international legally binding or non-binding instruments in the analysed area, stakeholders oftentimes introduce initiatives to

[84] Climate Change AI: *Feedback on the proposed Harmonised Rules on Artificial Intelligence*, 6 August 2021, p. 2–3. Online: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12527-Artificial-intelligence-ethical-and-legal-requirements/F2665623_en (quoted 1 July 2022).

[85] *Ibid*., p. 2–3.

[86] *Ibid*., p. 3–4.

enhance goals presented by international organizations or States. Regarding the use of AI in the context of EGD, most notable is the Self-Regulatory Initiative for Climate Neutral Data Centres (hereinafter "the Initiative) which brings together 54 data center operators and 22 trade associations. The Initiative was asked by the European Commission to create policy recommendations to ease the pathway towards climate neutrality. The outcome document, *The Climate Neutral Data Centre Pact* (hereinafter "CNDCP"), encompasses a comprehensive set of 19 recommendations. The current signatories of the Pact represent 90% of the industry in Europe and most of its key players,[87] which presents a promising start in the achievement of EGD goals. They have committed themselves to taking measures that focus on sustainability, energy efficiency, water saving, clean energy, reliability, security and the use of technologies and systems to make data centers climate neutral by 2030.[88] Regarding the acceleration of climate neutral data centres the CNDCP calls to: (1) ensure that Green Public Procurement guidelines and the Sustainable Taxonomy recognise the Climate Neutral Data Centre Self-Regulatory Initiative as a qualifying sustainability standard for data centres; (2) encourage Member States to include the Self-Regulatory Initiative for Climate Neutral Data Centres within their national procurement frameworks and prevent fragmented national approaches on data centre sustainability; and (3) require Member States to ensure that the development of new public s ector data centres or the retrofitting of existing public data centres must meet the requirements set by the Self-Regulatory Initiative. As the initiative states, Member States have been slow to adopt green public procurement mechanisms into their cloud procurement frameworks. Having Member States include the Self-Regulatory Initiative as a procurement criterion is simple, efficient and allows Member States to set a high bar that ensures they are purchasing from climate neutral data centres. Furthermore, regarding the last recommendation, the construction of enterprise data centres by the public sector is inefficient and these data centres often struggle to operate sustainably. The European Commission should ensure that the public sector data centres meet the requirements of the Self-Regulatory Initiative to ensure

[87] Datacenter Forum: *Climate Neutral Data Centre Pact Presents Plans to European Union*, 25 June 2021. Online: https://www.datacenter-forum.com/datacenter-forum/climate-neutral-data-centre-pact-presents-plans-to-european-union (quoted 1 July 2022).

[88] For more details see: *Climate Neutral Data Centre Pact*. Online: https://www.climateneutraldatacentre.net/self-regulatory-initiative/#circular-economy (quoted 1 July 2022).

that wasteful public sector facilities are phased out.[89] When it comes to the energy efficiency, the CNDCP calls to provide financial support for energy efficiency measures to small and medium enterprise (SME) data centre operators that are signatories to the Initiative to help them meet their goals and targets; and to drive research and investment into new efficiency technologies that can be used by the information and communication technology (ICT) sector. Energy efficiency can be further improved by using new technologies that not only focus on optimising the supporting infrastructure of the data centre in an isolated manner, but also tap into previously untapped potential of the energy used in a data centre as a whole (e.g., AI-driven Data Centre Infrastructure Management systems).[90] In clean energy, signatories have committed to match their electricity supply through the purchase of clean energy. Under the Initiative, data centre electricity demand will be matched by 75% renewable energy or hourly carbon-free energy by December 31, 2025 and 100% by December 31, 2030. To achieve the mentioned goal, the Pact calls on Member States:

(a) to ensure that corporate clean energy procurement and public tendering schemes for renewables can co-exist without disadvantaging corporate buyers;
(b) to use their renewable energy surcharges as a mechanism to encourage renewable energy purchasing by voluntary buyers from all industries;
(c) to set out target dates, pathways, and measures for the decarbonisation of their electricity supplies as part of their National Energy and Climate Plans;
(d) to adequately value flexible zero- and low-carbon resources to allow them to enter the system services market and serve as a resource for the power system.

Furthermore, the European Commission in cooperation with Member States should strengthen provisions in Articles 15 (8) and 19 of the *Renewable Energy Directive* to ensure the roll-out of ambitious frameworks to enable corporate clean energy procurement. Lastly, the European Commission is called to support the creation of an interoperable, open, smart grid data space for the industry to map to Data Centre Infrastructure Management ap-

[89] Self-Regulatory Initiative for Climate Neutral Data Centres: *The Climate Neutral Data Centre Pact*, p. 2. Online: https://www.climateneutraldatacentre.net/self-regulatory-initiative/#circular-economy (quoted 1 July 2022).
[90] *Ibid.*, p. 3.

plications.[91] To reduce the water use, the signatories committed themselves to streamline and facilitate the reuse of industrial water and other non-potable water sources by developing guidance for Member States, and to conduct standardized, consistent, and high-quality watershed risk assessments across Europe. According to the CNDCP, the European Commission can reduce barriers to the reuse of industrial water and other non-potable water sources for cooling by developing guidance for Member States. Guidance can harmonize how Member States consider water discharge requirements, taking into account the chemistry of the water intake, and ensure alignment with the *Water Framework Directive* guidelines and ambitions.[92] Regarding circular economy, signatories call: (a) to avoid policies that inhibit circular economy material flows, including waste shipments. Supply and production chains of the electronics industry are global, as are repair and remanufacturing; (b) to engage data centre operators and original equipment manufacturers in policy developments to ensure a systems approach and accommodate existing best practice such as closed loop manufacturing; and (c) to support circular economy principles by developing policies and targets that accommodate reuse and refurbishment of electronic waste.[93] Lastly, within the circular energy systems, signatories agreed to explore the recovery and reuse of heat from new data centres. They call to recognise recovered and reused heat as an energy source that reduces emissions for real-estate developers, building owners and other stakeholders and, consequently, to enact a policy framework that facilitates and encourages any energy intensive industry to pursue heat recovery and reuse projects in partnership with communities or businesses. Furthermore, they call to ensure that policies recognise other circular approaches, such as closed loop heat recovery, and do not limit opportunities for alternative heat recovery technologies.[94] The abovementioned recommendations serve as a good starting point for the future actions taken by the EU, Member States, as well as the stakeholders developing, using and servicing AI systems in climate-related areas. However, the question arises as to how successful this and also other initiatives in the analysed area will be in the fight against climate change and whether the prepared stakeholder recommendations will become a part of the EU or national legislation.

[91] *Ibid.*, p. 4–5.
[92] *Ibid.*, p. 6.
[93] *Ibid.*, p. 7.
[94] *Ibid.*, p. 7–8.

Conclusion

The current state of climate change demands from the subjects of international law, as well as stakeholders and individuals to adopt resolute steps towards climate neutrality as soon as possible. One of the most progressive, if not the most in this regard is the EU, which set the example with the adoption of the EGD, a new growth strategy to make Europe the first climate-neutral continent by 2050, at the same time boosting the economy, improving people's health and quality of life, caring for nature, and leaving no one behind. As it was outlined in the paper, the relevant EU institutions adopted much needed legislative acts or initiatives to achieve the goals set in the EGD or are currently reviewing the existing EU legislation in areas, such as biodiversity, circular economy, zero pollution, sustainable and smart mobility, renovation wave, sustainable food, hydrogen, batteries, offshore renewable energy and others. The EU in its efforts to achieve climate neutrality relies on the use of new technologies, such as artificial intelligence. In the paper, several AI systems applicable in climate action were highlighted, as well as relevant initiatives and strategies concerning AI. Namely, the reviewed *Coordinated Plan for AI*, the European Data Strategy or the EU Digital Strategy. Despite many positive impacts of AI in the climate change adaption and mitigation, it is necessary that the EU addresses mainly the negative impacts in its legislation. Currently, there is no legally binding act at the EU level that would specifically regulate the development, manufacture or use of the AI. The legal gap, however, may be removed by the adoption of the *AI Act*, which may become the first international legally binding document on AI regulating high-risk AI systems. From the EGD perspective and subsequent initiatives, it is recommended that the Act more explicitly involves climate change mitigation and adaptation in the classification rules for high-risk AI systems, and that reporting requirements for high-risk AI systems are expanded to collect data on greenhouse gas impacts, including impacts through both computational energy use and the applications for which these systems are used. Lastly, we analysed the *Climate Neutral Data Centre Pact*, the outcome document of the Self-Regulatory Initiative for Climate Neutral Data Centres, whose aim is to achieve the EGD goals in the area of energy efficiency, water saving, clean energy, reliability, security, and sustainability of data centres. The analysis led to the conclusion that the recommendations in the Pact are a good starting point for the future actions taken by the EU, Member States, as well as the stakeholders developing, using and servicing AI systems in cli-

mate-related areas. To conclude, the EU at the current state needs to review the existing legislation applicable to the use of AI, as well as adopt sector specific acts, that would reflect the specific aspects of AI in climate action, such as climate-related data sharing. Although there is a high level of cooperation between the EU institutions and relevant stakeholders in the preparation of appropriate legal framework, it is important that the majority of legal acts are adopted as regulations, which would prevent the fragmentation of legal norms within individual EU Member States. Lastly, the use of AI systems in the context of the EGD needs to be in accordance with the existing international legal norms of the international environmental law, international human rights law and the principles of sustainable development.

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