Common Market Law Review **59**: 19–48, 2022.

MANAGING THE ECOLOGICAL TRANSITION OF THE EU: THE EUROPEAN GREEN DEAL AS A REGULATORY PROCESS

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Abstract

The article discusses the rationale and ways of functioning of the European Green Deal (EGD) project, launched by the Commission in December 2019 and developed through a variety of measures ranging from the European Climate Law to the "Fit for 55" package. After situating the EGD in the context of the European multidimensional crisis, the article focuses on the EGD's objectives and its instruments. It is argued that the EGD may be interpreted as a highly ambitious but still fragile regulatory project that aims at managing a transition from one phase of the European integration process to another. Its ambivalent relationship with existing international initiatives in the field of climate change is explored in the last part of the article.

1. Introduction: Taking the EGD seriously

The European Green Deal (EGD) is about the *finalité* of Europe. Far from dealing only with environmental protection, it is a wide-ranging and ambitious regulatory project, calling for a renewal of the European construct beyond the consolidated *acquis*. Admittedly, its macro-objective – the irreversible and gradual reduction of emissions and enhancement of removals by sinks of greenhouse gases in the Union[1] – clearly falls within the boundaries of climate and environmental action. Its ambitions, however, go far beyond such a commitment. Climate neutrality is conceived as a target with a highly transformative force, pointing to the establishment of "a new European society", which the Commission describes at the same time as fair and prosperous, sustained by a more advanced growth model and founded on a positive and harmonious relationship between human beings and the

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1. 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) 401/2009 and (EU) 2018/1999 (European Climate Law), O.J. 2021, L 243/1, Art. 1.

environment.[2] Beneath the surface of the apparently technical goal of climate neutrality, lurks an attempt to reorientate the fundamental mission of the European integration project.

This article takes the EGD's ambitions seriously.[3] Its purpose is to provide an interpretation of the rationale of the EGD and the way it functions, both within the European Union and on a global scale. It should immediately be clarified that the term "EGD" is used here to refer to the overall and still ongoing regulatory process triggered by the EGD Communication, adopted by the Commission in 2019 as the first manifestation of "a Europe that strives for more".[4] Such a process relies on a large number of subsequent measures with different regulatory forms: legislative measures and programmes, exemplified, respectively, by the "European Climate Law" and the "Fit for 55" package;[5] sectoral strategies, such as the European Industrial Strategy and the Strategy for EU biodiversity;[6] and various types of policy documents, such as the Circular Economy Action Plan and the European Green Deal Investment Plan.[7] These are all presented in the "timeline" available on the Commission's website.[8]

In order to explore the rationale and dynamics of the ongoing process, first the wider context is presented in which the EGD has been launched and is in the process of being developed by the Commission (section 2). Referring to the context is significant insofar as it allows us to put the EGD in perspective and understand its potential relevance in the European integration process (section 3). The article then looks at both its substantive objectives (sections 4 to 6) and its regulatory instruments (section 7). Finally, the article places the EGD in the context of global governance, where a flourishing system of regimes aimed at tackling climate and environmental-related challenges is at work (section 8).

The essence of the argument is as follows. First, the EGD can be interpreted as a project aimed at managing a transition from one phase of the European

2. Commission Communication, "The European Green Deal", COM(2019)640.

3. See Editorial Comments, "The European Climate Law: Making the social market economy fit for 55?", 58 CML Rev. (2021), 1321–1340.

4. Von der Leyen, *A Union that strives for more: My agenda for Europe. Political guidelines for the next European Commission 2019–2024*, 2019, available at <ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf> (all websites last visited 30 Oct. 2021).

5. European Climate Law cited *supra* note 1; and "'Fit for 55': Delivering the EU's 2030 climate target on the way to climate neutrality", COM(2021)550.

6. "A new industrial strategy for Europe", COM(2020)102; and "EU biodiversity strategy for 2030. Bringing nature back into our lives", COM(2020)380.

7. "A new circular economy action plan for a cleaner and more competitive Europe", COM(2020)98; and "European Green Deal Investment Plan", COM(2020)21.

8. See <ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en>.

integration process to another. In particular, it can be understood as an attempt to move on from the current phase of European integration – that of the European multidimensional crisis – and embark on a new and more positive phase, which is supposed to lead ultimately to the establishment of a new societal order. Second, the new phase is not a mere updating and modernization of the traditional European construct. While building on the deep values and consolidated structures of such a construct, the EGD enriches them in one remarkable way, namely by accepting that social and economic behaviour is ecologically bound. In this reading, the type of transition that it aims at managing is essentially an ecological one. Third, the ambitious and innovative vision promoted by the EGD is not sustained by an adequate set of regulatory tools. Fourth, the EGD has an ambivalent relationship with the main results of inter-State cooperation in the field of climate change, as it can be characterized both as an executive initiative, instrumental to the implementation of the Paris Agreement and the 2030 Agenda for sustainable development, and also as a more political step challenging the UN legal framework and promoting the European way forward as "a practical example for all other regions around the world".[9]

2. Context: The European multidimensional crisis

In order to explore the rationale and dynamics of the EGD, there is not one single context to take into consideration, but many.[10] For example, one might appropriately point to the cultural context provided by various strands of ecological thought, within and outside Europe; or refer to the ongoing evolution of Member States' societies and economies; or, again, consider the global political context, represented by inter-State negotiations and conflicts in the world community on climate change and issues related to the environment. For the purposes of this article, however, it is appropriate to situate the EGD within the context of the enduring and multidimensional crisis of the EU polity. It is in this framework, indeed, that the overall ambitions and potential relevance of the EGD become clear.

9. "Stepping up Europe's 2030 climate ambition. Investing in a climate-neutral future for the benefit of our people", COM(2020)562, at p. 7.

10. For a discussion of the theoretical foundations of the "law in context" approach in EU legal scholarship, see, in particular, Snyder, "Out on the weekend: Reflections on European Union law in context" in Wilson (Ed.), *Frontiers of Legal Knowledge* (Chancery, 1995), pp. 120–142, and Snyder, *New Directions in European Community Law* (Weidenfeld and Nicolson, 1990), where formalism and legal positivism are rejected, and it is argued that law is integral to society and should be situated in its broader context, whether social, political, economic, or cultural, using insights and modes of analysis from other disciplines.

The phrase "European multidimensional crisis" refers here to the phase of the European integration process that started in 2008 and extends to the present. The events that occurred between 2008 and 2010 have been typically portrayed in European legal scholarship as a financial and public debt crisis, i.e. a purely internal challenge to the smooth functioning of the institutional and legal framework of the internal market and the economic and monetary union (EMU). Reality, however, is much more complex. The financial and public debt crisis had deep and ramified roots that can be traced back to a number of interconnected processes in the history of the integration project, well pre-dating the fall of the Lehman Brothers in September 2008. They range from Europe's neo-liberal shift in the 1970s, to the failure of the attempts to clarify the constitutional nature of the EU as a polity transcending the nation-state form.[11] The manifold roots of the crisis that exploded in 2008 also allow its evolution as a highly complex, multidimensional crisis to be revealed. Far from being merely financial and public debt-related, the European crisis has involved other central EU policy fields, including border control and migration,[12] and has rapidly become an economic, institutional, and constitutional crisis as well.[13] Moreover, the crisis has been exacerbated by the pandemic emergency and is continuously fed by events raising questions about mutual trust and common values in the EU and revealing diverging attitudes to the rule of law, such as the *PSPP* judgment of the German Federal Constitutional Court (FCC),[14] and the successful efforts of

11. Chiti, Menéndez and Teixeira "The European rescue of the European Union" in Chiti, Menéndez and Teixeira (Eds.), *The European Rescue of the European Union? The Existential Crisis of the European Political Project* (Arena Report No. 3/12 and Recon Report No. 19, 2012), pp. 391–427, at p. 393.

12. See Editorial Comments, "Europe is trembling. Looking for a safe place in EU law", 57 CML Rev. (2020), 1675–1688, at 1686 et seq.; Costello, "Overcoming refugee containment and crisis", 21 GLJ (2020), 17–22; Menéndez, "The refugee crisis: Between human tragedy and symptom of the structural crisis of European integration", 22 ELJ (2016), 388–416.

13. An overview of this process has been recently provided by Nanopoulos and Vergis (Eds.), *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge University Press, 2019). See also the analytical framework provided by Ferrara and Kriesi, "Crisis pressures and European integration", 28 *Journal of European Public Policy* (2021), DOI: 10.1080/13501763.2021.1966079, arguing that there are four EU decision-making scenarios in times of crisis, each of which combine analytical insights from neofunctionalism, intergovernmentalism, post-functionalism, and federalism.

14. FCC, judgment of 5 May 2020 2 BvR 859/15, translation available at <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html>. See, in particular, "Editorial Comments: Not mastering the Treaties: The German Federal Constitutional Court's *PSPP* judgment", 57 CML Rev. (2020), 965–978, pointing to the risk that the FCC's idea of ultra vires review erodes the concept of a Union of democratic States guided by the rule of law; see also the I•CON symposium on the *PSPP* ruling and, in particular, Basedow, Dietze, Griller, Kellerbauer, Klamert, Malferrari, Scharf, Schnichels, Thym,

the Hungarian and Polish governments to weaken the linking of the protection of the rule of law to the allocation of EU funds.[15]

This characterization of the enduring multidimensional crisis obviously requires articulation in various ways.[16] What is of interest for our analysis, however, is the transformative force of the European crisis, i.e. its capacity to set in motion a number of processes affecting in various ways the structural and substantive features of the EU polity. Three processes are prominent in this regard and deserve to be highlighted.

The first process is the gradual autonomization of the Eurozone. As a result of the institutional reorganization of the internal market in financial services and the EMU, the Eurozone has progressively evolved from a "jurisdiction" to an "organization". While it was originally constructed as a group of EU States subject to specific rules, it has gradually become an institutional system with its own members, rules, and institutions – both political (the Euro summits and the Eurogroup) and administrative (e.g. the European Central Bank (ECB) and the Single Supervisory Mechanism) – capable of elaborating and implementing a number of policies which are not necessarily in line with the political agenda of the EU as a whole. The Eurozone, in other words, has been redesigned in the last ten years as an organization relying on an institutional framework that offers its Member States a legal route towards deeper and broader policy co-ordination among themselves. This is an important innovation, which goes beyond the traditional arrangements of institutional and legal differentiation within the EU.[17] It is also a problematic development,

Tomkin, "European integration: *Quo vadis*? A critical commentary on the *PSPP* judgment of the German Federal Constitutional Court of May 5, 2020", 19 I-CON (2021), 188–207.

15. See Editorial Comments: "Compromising (on) the general conditionality mechanism and the rule of law", 58 CML Rev. (2021), 267–284, where it is reaffirmed that the rule of law, posited as a value common to the Member States, "should continue to condition all the benefits of membership", at 284. 89–391.

16. While the European crisis has affected various dimensions of the EU polity, legal scholarship has mainly focused on its constitutional impact: See e.g. De Witte, "Euro crisis responses and the EU legal order: Increased institutional variation or constitutional mutation?", 11 EuConst (2015), 434–457; Tuori and Tuori, *The Eurozone Crisis*. *A Constitutional Analysis* (Cambridge University Press, 2014); Craig, "Economic governance and the euro crisis: Constitutional architecture and constitutional implications" in Adams, Fabbrini and Larouche (Eds.), *The Constitutionalization of European Budgetary Constraints* (Hart, 2014), pp. 19–40; Dawson and De Witte, "Constitutional balance in the EU after the euro-crisis", 76 *Modern Law Review* (2013), 817–844; Chiti and Teixeira, "The constitutional implications of the European responses to the financial and public debt crisis", 50 CML Rev. (2013), 683–708; and Weiler, "Europe in crisis – on 'political messianism', 'legitimacy' and the 'rule of law'", (2012) *Singapore Journal of Legal Studies,* 248–268.

17. For a reconstruction of the way the role played by differentiation (and differentiation mechanisms) in the European integration process evolved, see Curtin, "From a Europe of bits and pieces to a Union of variegated differentiation" in Craig and de Búrca (Eds.), *The Evolution*

as it raises the complex issue of the clarification and rationalization of the relationships between the EU and the Eurozone with a view to ensuring their functional and normative stability.

A second remarkable process has been the establishment of an innovative but problematic framework in order to tackle the impact of the financial and public debt crisis within the Eurozone. The new framework combines a number of complementary elements, namely financial assistance granted to States experiencing fiscal difficulties (through a European Monetary Fund eventually consolidated into the European Stability Mechanism (ESM)), conditionality (the so-called austerity policies implemented by the "troika"), limitation of national fiscal sovereignty, and unconventional monetary policy (through the Outright Monetary Transactions (OMT)). This development represents a remarkable attempt to correct the shortcomings of the EMU. The setting up of instruments of financial assistance has opened the way to a mutualization between the Eurozone countries of the costs connected to economic imbalances, while the launch of OMT has been a move away from the original paradigm of central banking based on price stability and inflation. At the same time, however, the combination of the various elements (financial assistance, conditionality, limitation of national fiscal sovereignty, and non-conventional monetary policy) has proved to be highly problematic, both from a functional and legal perspective. The existing mechanisms for financial assistance, requiring strict conditionality and accompanied by austerity programmes, have reinforced the already ongoing process of divergence and polarization between core and periphery States of the Eurozone.[18] Moreover, the limitation of the fiscal sovereignty of the Member States has not been accompanied by either the provision of a genuine EU fiscal competence or the establishment of a supranational economic governance. In addition, recourse to instruments of unconventional monetary policy on the part of the ECB has widened the ECB's mandate on the basis of a loose and disputed interpretation of the relevant Treaty provisions.[19]

The third and last process has followed a partially different trajectory. As a response to the pandemic emergency and the subsequent economic shock, the EU institutions and Member States have introduced a genuinely original

of EU Law, 3rd ed. (OUP, 2021), pp. 373–398, where the idea of "a more semi-permanent multi-speed EU with at its very core the Eurozone members" is also discussed, pp. 389–391.

18. Such a process of divergence has been analysed by a rather rich economic literature on the Eurozone. See the overall recent account by Gräbner, Heimberger, Kapeller and Schütz, "Is the Eurozone disintegrating? Macroeconomic divergence, structural polarisation, trade and fragility", 44 *Cambridge Journal of Economics* (2021), 647–669, focusing on polarization both in the pre-crisis and post-crisis years.

19. See Case C-62/14, *Gauweiler and others*, EU:C:2015:400; and BVerfG, judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13.

instrument of transnational solidarity, available to the countries worst affected by the COVID-19 pandemic, within and outside the Eurozone, and entailing the exceptional transfer of sizeable resources in the form of grants and loans. Indeed, the Next Generation EU (NGEU) package has been both a case of "creative legal engineering"[20] and a bold political move to go beyond the unconventional measures of monetary policy exemplified by the Pandemic Emergency Purchase Programme (PEPP) launched by the ECB, and to shift part of the burden to the EU budget through a Recovery and Resilience Facility (RRF). While the new initiative reflects a federalist understanding of transnational solidarity, in principle rejecting the structural divide between creditor and debtor countries, it is clearly an exaggeration to celebrate it as the "Hamiltonian moment" of the EU. The ongoing process is more ambivalent and nuanced: the RRF may be the first expression of a permanent fiscal capacity of the EU, but it currently rests on a precarious political consensus achieved on the assumption of its exceptional nature.[21]

The three processes show the transformative force of the European crisis, as well as the tensions inherent in the ongoing transformations. They represent an attempt to tackle the crisis, but they cannot be seen as gradual and continuous progress towards a set of stable solutions. The first two developments are both part of the solution and part of the problem, since they have strengthened some of the existing institutional imbalances and tensions; while the NGEU is an exceptional and temporary response, incapable, as such, of addressing in a stable way the issues raised by the other processes. The current phase of the European integration process is a story of advances and failures in the management of a series of interconnected emergencies, instead of a linear process culminating in the NGEU. It is in this context that we must situate the EGD.

3. The Green Deal as a regulatory project: Managing the transition to a new phase of the European integration process

When positioned in the wider framework of the European multidimensional crisis, the EGD immediately reveals its links with the above-mentioned developments, and with the NGEU programme in particular. Indeed, the

20. As argued by De Witte, "The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift", 58 CML Rev. (2021), 635–682, discussing the many central issues of EU institutional law that have been handled by the architects of the NGEU programme.

21. Dani, Chiti, Mendes, Menéndez, Schepel and Wilkinson, "'It's the political economy..!' A moment of truth for the Eurozone and the EU", 19 *International Journal of Constitutional Law* (2021), 309–327, section 6.

EGD aims to achieve a number of policy objectives that partly coincide with those of the NGEU, now presented by the Commission as a crucial step towards building a "fairer, greener and more digital Europe".[22] Moreover, the implementation of the EGD will be financially sustained by the NGEU, as up to EUR 605 billion will be spent on projects addressing the climate crisis together with EUR 100 billion in projects supporting biodiversity under the 2021–2027 Multiannual Financial Framework (MFF) and NGEU.[23]

Though directly connected to the NGEU programme, however, the EGD should be regarded as a regulatory project with specific and autonomous relevance. In order to detect its distinctness, it is appropriate to focus on some of its key characteristics.

The first and most obvious feature is that it is not a purely reactive and defensive programme, a response to a number of unexpected and critical events. Quite the contrary: it explicitly aims at articulating a prospective political project and is a regulatory manifestation of the Commission's intention to shape the present and future EU agenda.[24]

From this point of view, the EGD is purportedly an innovative initiative. Unlike all earlier institutional attempts in the crisis years, and in spite of the claimed continuity with some previous regulatory initiatives of the Juncker's Commission, its purpose is to offer a political vision of the future of Europe rather than merely an emergency response to a new dimension of the crisis. The rationale of the EGD, in other words, is not that of "taming the tiger", i.e. managing an unexpected event and attenuating its possibly devastating impact. Instead, the EGD expressly aims at shaping the societal future of Europe. This also explains the EGD's long-term temporal perspective as well as its relevance for the "entire policy spectrum".[25] This also clarifies its relation to the NGEU: the latter is an emergency and temporary response to the economic shock generated by the pandemic crisis, which can potentially be further articulated and extended, as is clearly shown by its representation as a key instrument of a new "Union of vitality" in Ursula von der Leyen's State

22. See the webpage dedicated to Next-Generation-EU, available at <europa.eu/next-generation-eu/index_en>, which opens by stating that "NextGenerationEU is more than a recovery plan – it is a once in a lifetime chance to emerge stronger from the pandemic, transform our economies and societies, and design a Europe that works for everyone. We have everything we need to make this happen. We have a vision, we have a plan and we have agreed to invest €806.9 billion together" (omitting * footnote). See also "Europe's moment: Repair and prepare for the next generation", COM(2020)456.

23. "Strategy for financing the transition to a sustainable economy", COM(2021)390, section 1.

24. COM(2019)640, cited *supra* note 2, point 1.

25. European Climate Law, cited *supra* note 1, Recital 25.

of the Union address.[26] The fundamental locus of political change, however, is the EGD, which delineates the overall direction of the evolution of Europe and shapes the available instruments accordingly.

In addition to this, the EGD is designed as a regulatory project for the EU at large, not for the Eurozone only. In stark contrast to one fundamental trend of the last decade – the progressive autonomization of the Eurozone – the EGD triggers a process which involves all EU Member States, within and outside the Eurozone. Interestingly, the Commission does not present the EGD as a process of legal and institutional unification, i.e. as a process developing a set of instruments aimed at managing and composing the tensions and conflicts between the various ramifications of the European integration project. Rather, it assumes that the EU is already a unitary construct and envisages a process building on that legal and institutional unity.[27] As this assumption does not correspond to the current state of affairs, it remains unclear how the Commission intends to reintegrate all the various sub-systems into a unitary legal and institutional construction. In any case, the assumption reflects the Commission's ambition to use the EGD project as a mobilizing force for all European actors and as a joint and collective enterprise. The same unitary approach characterizes the NGEU, which will finance, as already highlighted, several EGD actions.

A further important element concerns the substantive contents of the EGD. In the Commission's vision, the macro-objective of a climate-neutral Europe should be achieved through a number of interconnected measures falling within and cutting across a wide range of policy fields, starting with energy, environmental protection, and industrial policy. Moreover, climate neutrality is articulated in a number of sub-objectives, which specify and give concreteness to the EGD macro-objective: for example, the introduction of a carbon border tax to avoid carbon leakage; the development of a new industrial policy for Europe, based on a circular economy and clean technologies; and the shift to sustainable and smart mobility. The objective of a climate-neutral Europe, however, is not at all purely technical. As already observed, the technocratic goal of climate neutrality is explicitly linked, in the text of the EGD Communication, to the establishment of a new societal order characterized by the Commission as fair and prosperous, sustained by a new growth model and based on a more harmonious relationship between human beings and the environment.[28]

26. State of the Union Address by President von der Leyen at the European Parliament Plenary, available at <ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655>.
27. COM(2019)640, cited *supra* note 2, point 1.
28. Ibid.

Seen in this perspective, the EGD Communication is different from other key historical initiatives of the Commission, such as the 1985 Internal Market White Paper. It is, indeed, politically very transparent, as it presents in a clear way a number of fundamental choices rather than hiding them under a technocratic mask of uncontroversial and minimalist functional options.[29] More precisely, the rhetoric and substance of the EGD Communication are those of a text in dialogue with other European constitutive documents, starting with the Schuman Declaration of 9 May 1950, and envisaging a change in the European integration process. The EGD is presented in the 2019 Communication in inspiring and at times even ceremonious language,[30] as a prospective political project designed for the EU as a whole. It aims to leave behind the current phase of European integration – that of the European multidimensional crisis, now exacerbated by the pandemic emergency – and to enter into a new and more positive phase, ultimately leading to the establishment of a new societal order.

The EGD ambitions are great, but how can one describe more precisely the substantive features of the new societal order that the EGD wishes to establish? And what are the regulatory instruments through which such an overall objective is supposed to be achieved?

4. Regulatory objectives

4.1. *Reshaping the EU substantive constitution*

In order to see where Europe is going, we need to look back at where it has come from, and our point of reference is the EU "substantive constitution" that has developed over the past decades.

29. On the "political subtlety" of the 1985 White Paper, see Weiler, "The transformation of Europe", 100 *The Yale Law Journal* (1991), 2403–2483, at 2457, stressing that the White Paper "delineated the ostensibly uncontroversial goal of realizing an internal market, and, in the form of a technical list of required legislation, the uncontroversial means necessary to achieve that goal".

30. Commission Communication cited *supra* note 2. See e.g. the representation of climate and environmental-related challenges as "this generation's defining task" (p. 2); the reference to the EGD as a deeply transformative project (see e.g. pp. 2 and 4), inspired by the compelling vision of a new societal order ("a fair and prosperous society, with a modern, resource-efficient and competitive economy", p. 2); the call for a founding alliance, a "new pact" bringing together "citizens in all their diversity, with national, regional, local authorities, civil society and industry working closely with the EU's institutions and consultative bodies" (p. 2; see also p. 22); the long-term horizon of the ultimate purpose of the project, which is supposed to animate both present and future generations (p. 24); the reference to the global relevance of the EGD through which the EU is expected to provide a strong contribution to the global response to climate change and environmental degradation (p. 20) and govern a set of processes which will "reshape geopolitics, including global economic, trade and security interests" (p. 21).

Over the years, the EU substantive constitution has successively developed four main components i) a project of economic integration, i.e. a project oriented towards the gradual elimination of economic borders between Member States, combining the internal market and the Economic and Monetary Union and complemented by competition and State aid law and other pro-competitive disciplines, such as public procurement;[31] ii) economic regulation, a pro-competitive mode of regulation, an alternative to public ownership and planning, used extensively in the EU since the early 1990s in fields such as energy, electronic communications, and transport;[32] iii) social regulation, here meant as a specific type of regulation aimed at deepening and articulating the market in such a way as to ensure certain social interests in the marketplace, and exemplified by consumer protection and environmental protection – this has become a key component of the EU substantive constitution since the mid-1980s and the famous White Paper on Completing the Internal Market;[33] and iv) industrial policy, a latecomer component of the EU substantive constitution that has become an increasingly significant instrument since the beginning of the crisis.[34]

This construction is affected by the EGD in several ways, examined in the following sections.

31. The legal literature on European economic integration is vast and there is no way to refer to it, not even by way of a selection. See, however, the overall perspective provided by Weiler, "The constitution of the common market place: Text and context in the evolution of the free movement of goods" in Craig and de Búrca (Eds.), *The Evolution of EU Law*, 1st ed. (OUP, 1999), pp. 349–376; see also Cruz (Ed.), *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart, 2002). For a discussion of the fundamental concepts of economic integration, see, in particular, Molle, *The Economics of European Integration. Theory, Practice, Policy*, 5th ed. (Routledge, 2006), pp. 9–32, distinguishing between different stages of economic integration, from the free trade area to full economic union.

32. The distinction between this component of the EU substantive constitution and the previous one is, of course, blurred, provided that market regulation can be considered as a dimension of the gradual merging of national markets. It is presented here as an autonomous component of the EU substantive constitution, though, to stress its specific relevance as a tool to create new markets, i.e. to establish competitive markets in areas where national markets were missing. For a discussion of economic regulation, see, in particular, Majone, "The rise of the regulatory state in Europe", 17 *West Politics* (1994), 77–101; Liberati, *La regolazione indipendente dei mercati* (Giappichelli, 2019).

33. Prosser, *The Regulatory Enterprise* (OUP, 2010); Majone, "The transformation of the regulatory State", Osservatorio AIR (2010), available at <osservatorioair.it/wp-content/uploads/2010/10/Paper_Majone_RegulatoryState_sept2010.pdf>.

34. Ambroziak (Ed.), *The New Industrial Policy of the European Union* (Springer, 2017).

4.2. *Integrating sustainability in procompetitive disciplines*

The EGD leaves the heart of the economic integration project – viz. the structural features of the internal market and EMU – substantially unchanged. However, it indirectly modifies the contents of pro-competitive disciplines, as it strengthens the relevance of alternative goals, in particular environmental goals, in their implementation and enforcement.

This is not at all an original development. The Commission has been promoting the integration of environmental and social goals into pro-competitive disciplines since the late 1990s. For example, when testing so-called "sustainable agreements" against Article 101(3) TFEU, the Commission has often considered that they offer benefits that offset their restrictions to competition and meet the exemption criteria, thus promoting a rather nuanced understanding of competition.[35]

Building on such developments, the EGD now offers an overarching policy framework promoting and justifying the consolidation of legal and institutional practices aimed at enforcing competition law in such a way as to prevent or mitigate the negative impact of economic activities on people and nature. While recognizing that the matter is still unsettled and open to various possible developments, it is legitimate to expect that the Commission will not take a purely defensive position. Indeed, it may be difficult for the Commission to confirm the current interpretation of EU competition law and ignore or neutralize the new policy framework that it has laid down through the EGD. A first (hesitant) indication in this direction comes from the call launched by the DG Competition to gather proposals for enabling competition to contribute to the effectiveness of green policies, where it is openly recognized that "competition policy is not in the lead when it comes to fighting climate change and protecting the environment" and it is tentatively discussed how to improve competition policy's contribution to the EGD under the existing legal framework.[36] In addition to this, the Commission has announced that further legislation and guidance on green public purchasing will be proposed.[37] One should also recognize the important role played by European legal scholarship in framing an agenda for institutional discussion. A number of proposals have been made to tailor the enforcement of antitrust

35. Dolmans, "Sustainable competition policy", 6 *Competition Law and Policy Debate* (2020), 4–23; and Brook, "Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five competition authorities", 56 CML Rev. (2019), 121–156.

36. DG Competition, *Competition Policy supporting the Green Deal. Call for contributions*, Oct. 2020, available at <ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf>.

37. COM(2020)102, cited *supra* note 6, at p. 10.

law to the EGD,[38] as well as to strengthen the green public procurement regime, and to give full effect to the existing legal provisions, such as Article 18(2) of Directive 2014/24/EU.[39] These proposals provide the Commission with viable and realistic options without necessarily calling for a reform of the existing legal framework.

4.3. *Beyond traditional economic regulation*

Furthermore, the EGD reshapes the objectives of the second macro-component of the EU substantive constitution: economic regulation. It does so by envisaging the transition from a production structure entirely based on non-renewable energy sources, especially fossil fuels such as natural gas, oil and coal, to one powered by renewable energy. Indeed, the objective of climate neutrality can only be achieved provided that the policies oriented to eliminate coal are accompanied by policies designed to support clean energy and to make available sorts of power alternative to and cheaper than coal. Such energy transition is likely to change the relevance and quality of administrative regulation. So far, economic regulation has operated essentially through legal disciplines functionally aimed at creating competitive markets and implemented and enforced by administrative bodies exercising non-discretionary powers. The energy transition, instead, may challenge this consolidated model of regulatory policymaking by articulating the public interests at stake and opening the way to the exercise of political and administrative discretion. The proposed revision of the Energy Efficiency Directive within the "Fit for 55" package,[40] for example, suggests that national regulators may have a central role in balancing different and competing public interests, including environmental protection and competition. By affirming the "energy efficiency first principle",[41] the proposed Directive imposes on Member States a number of obligations which are not only aimed at effectively addressing remaining market barriers, but should also "consider, where appropriate, wider sustainability,

38. See e.g. Monti, "Four options for a greener competition law", 11 JECLAP (2020), 124–132; Gerbrandy, "The difficulty of conversations about sustainability and European competition law", 12 *Antitrust Chronicle* (2020), 62–66.

39. See e.g. Pouikli, "Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: Reconsidering the role of public procurement as an environmental policy tool", 21 *ERA Forum* (2021), 699–721; and Andhov and Caranta (Eds.), "Sustainability through public procurement: The way forward – reform proposals" (SMART Project Report, 2020), available at <die-gdi.de/uploads/media/Sustainability_through_public_procurement_the_way_forward_Reform_Proposals.pdf>.

40. European Commission, Proposal for a directive on energy efficiency (recast), COM(2021)558.

41. Ibid., Art. 3(1).

social, environmental and circular economy aspects”, beyond the traditional tasks of promoting competition and correcting externalities. It is also important to stress that economic regulation is accompanied by policies to ensure “solidarity”. In the “Fit for 55” package, indeed, efforts are to be shared between Member States “in the most cost effective way” and support is to be given “to those most in need, to ensure that the transition reaches everybody in a beneficial way”.[42] Examples of this kind of redistributive measures, which complement and support economic regulation in the EGD overall framework, include the creation of a Social Climate Fund, providing dedicated funding to vulnerable citizens and micro-enterprises.[43]

4.4. *Stretching social regulation*

The EGD also has an impact on social regulation, whose traditional purposes are enriched and revised by the EGD in a way that blurs the distinction between social regulation and social policies. The new Farm to Fork Strategy for a fair, healthy and environmentally friendly food system, provides an interesting example.[44] By pointing to the establishment of a sustainable food system, instrumental to the wider purpose of climate neutrality, the Strategy links a number of different objectives of social regulation, ranging from the quality of food to environmental protection. Moreover, it clearly characterizes those objectives as social interests to be ensured within the market place. Indeed, such objectives should allow a transition towards “competitive sustainability”, a somewhat loose formula reconnecting the different exigencies of ensuring “high standards of safety and quality, plant health, and animal health and welfare”, on the one hand, and of “generating fairer economic returns in the supply chain”, on the other.[45] Again, and most importantly, the new Strategy reaffirms and clarifies the connection between food safety and food security, as the food system is now explicitly oriented towards the “affordability” of high quality food and the most sustainable food is also supposed to become the most affordable.[46] By doing so, the Commission not only articulates and develops the model of social regulation at work in the food sector, but also

42. COM(2021)550, cited *supra* note 5, point 5.

43. Ibid., point 2.1.; see also European Commission, Proposal for a Regulation establishing a social climate fund, COM(2021)568.

44. “A farm to fork strategy for a fair, healthy and environmentally-friendly food system”, COM(2020)381. See Schebesta, Bernaz and Macchi, “The European Union farm to fork strategy: Sustainability and responsible business in the food supply chain”, 15 *European Food and Feed Law Review* (2020), 420–427.

45. COM(2020)381, ibid., at p. 4.

46. Ibid.

strengthens the relevance of an objective, that of "access to sufficient food",[47] which is not necessarily aimed at the protection of some social interests within the market, but may encapsulate the welfare State rationale of liberation from need. Although the model is still one of social regulation, the distinction between social regulation and social policies becomes less clear.

4.5. *Re-engineering industrial policy*

The EGD also affects the fourth component of the EU substantive constitution: industrial policy. In particular, it clearly strengthens its relevance and revises its objectives by launching a mobilization of European industry and sustaining a circular and regenerative growth model.[48] "Circularity" and "regeneration" mean, in this context, decoupling economic growth from resource use. In the Commission's words, "we must move away from the age-old model of taking from the ground to make products, which we then use and throw away", and set out a new sustainable product policy framework, one which "will establish sustainability principles for all products, helping to make Europe's industry more competitive".[49]

Time will tell whether this growth model implies a redefinition of the relationship between human beings and the environment, or rather assumes, in line with the political and economic tradition of the European project, that economy and ecology are not in inevitable conflict with each other, but that they may be reconciled through innovation. What should be noticed, in any case, is that the EGD is laying down the conditions for an industrial policy going beyond the strategy elaborated by the Juncker Commission.[50] Admittedly, how that policy will be precisely designed remains, for the time being, unclear; the distinguishing features of the model will gradually emerge from future legislative initiatives and actions identifying concrete goals and input, and monitoring indicators. However, the Commission has already

47. Ibid. See also p. 10, where the Commission argues that a "sustainable food system must ensure *sufficient* and varied supply of safe, nutritious, affordable and sustainable food to people at all times" (emphasis added).

48. See COM(2020)102, cited *supra* note 6, at pp. 10 et seq.; COM(2020)98, cited *supra* note 7, at pp. 3 et seq.; and "Updating the 2020 new industrial strategy: Building a stronger single market for Europe's recovery", COM(2021)350. On the role that industrial policy is destined to play in the implementation of the EGD, see Renda and Shaus (Eds.), "The new industrial strategy for Europe. Towards a resilient and sustainable post-pandemic recovery" (CEPS Task Force Report, 2021), available at <ceps.eu/wp-content/uploads/2021/06/IP-TF-Report-Executive-summary.pdf>; and Renda, "The EU industrial strategy: Towards a post-growth agenda?", 56 *Intereconomics* (2021), 133–138.

49. COM(2020)102, cited *supra* note 6, at p. 10.

50. "For a European industrial renaissance", COM(2014)14.

announced a number of measures which characterize industrial policy as an EU policy aimed at driving a multi-purpose transition and involving a plurality of public interests. An example is offered by the initiatives announced in strategic areas, such as raw materials, batteries, active pharmaceutical ingredients, hydrogen, semiconductors, and cloud and edge technologies. With these initiatives, the Commission has committed itself to creating – in partnership with industry, public authorities, social partners and other stakeholders – "transition pathways" for a number of "industrial ecosystems", exemplified by energy-intensive industries, construction and tourism, in which economic, environmental and social issues arise.[51] This development is in line with the broad statement that "Europe's industrial strategy must reflect our values and social market traditions",[52] which implies an industrial policy focused, simultaneously, on competition and open markets, sustainability, and social inclusion. While the precise contents of the model have not yet been defined, what the Commission is sketching is an EU industrial policy aimed at governing an economic, environmental and social transition, and inevitably requiring the balancing of diverse and potentially divergent public interests.[53]

4.6. *A new objective: Healthy ecosystems*

The last change brought about by the EGD is also the most remarkable and potentially most important. In its Biodiversity Strategy, the Commission sets a policy goal that we may conceptualize in terms of "ecosystems' health". The Strategy points to the fact that human beings exist and carry out their individual, social and economic lives within a variety of ecosystems, stressing that the health of such ecosystems is critical both for human health and economic activities. This requires two complementary activities, namely preservation and restoration.[54] The former tackles a number of key drivers of biodiversity loss, such as changes in land and sea use and overexploitation, while the aim of the latter is to reverse

51. COM(2021)350, cited *supra* note 48, at p. 16.

52. COM(2020)102, cited *supra* note 6, at p. 1.

53. In the same vein, Bruti Liberati, "Politiche di decarbonizzazione, costituzione economica europea e assetti di governance", 17 *Diritto pubblico* (2021), 415–442.

54. See COM(2020)380, cited *supra* note 6. The preservation and restoration of ecosystems and biodiversity is a policy goal expressly linked with the macro-objective of climate neutrality: "The biodiversity crisis and the climate crisis are intrinsically linked. Climate change accelerates the destruction of the natural world through droughts, flooding and wildfires, while the loss and unsustainable use of nature are in turn key drivers of climate change. But just as the crises are linked, so are the solutions. Nature is a vital ally in the fight against climate change", p. 2.

biodiversity loss. Both of them reflect the basic assumptions of ecosystem ecology,[55] starting with the idea that biological diversity has many different components, ranging from species and genetic diversity to the variety of the energy processes internal to each ecosystem.

Admittedly, one might argue that the objective of "healthy ecosystems" simply represents an articulation of the traditional understanding of environmental protection as social regulation; by referring to biodiversity, the EU is going beyond an understanding of the environment as a "non-living" physical space, made of soil, water, other forms of matter, and energy, without however changing the overall idea that the protection of the environment – both living and non-living – should be internalized in the market. Going against this reading, however, we can observe that preserving and restoring biodiversity is an objective which is not internal to the market, but external. Although the health of ecosystems is instrumental to the health and economic life of human beings, it is not economic growth and the market that should be sustainable, but ecosystems themselves.

This is an important point: by articulating a policy goal to protect and restore the integrity of the Earth's ecological systems, the EGD departs from the "ecological modernization" movement that shaped the making of EU environmental law and policy in the 1980s,[56] and endorses the genuinely different concept of "ecological primacy". Indeed, the very idea of ecological integrity, on which the goal to protect and restore healthy and well-functioning ecological systems is based, assumes that ecological limits must have primacy over social and economic regimes. From this point of view, climate neutrality proves to be a really transformative force. It requires that the European substantive constitution be revised in such a way as to internalize the preservation of the physical environment in which we live. But it also requires that the EU engages in a new objective – the preservation and restoration of ecosystems and biodiversity – which is autonomous from that of environmental protection insofar as it is not internal to the market, but external. Taken seriously, it does not shape the market, but operates as an external limitation, since it redefines sustainability as the duty to protect and restore the integrity of ecological systems and assumes that ecosystems' health must prevail over social and economic exigencies.

55. See the introductory account by Plutynski, "Ecology and the environment" in Ruse (Ed.), *The Oxford Handbook of Philosophy of Biology of EU Law* (OUP, 2008), pp. 504–524.

56. See e.g. Chalmers, "Inhabitants in the field of environmental law" in Craig and de Búrca (Eds.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), pp. 653–692; and Andersen and Massa, "Ecological Modernization — origins, dilemmas and future directions", 2 *Journal of Environmental Policy & Planning* (2000), 337–345.

5. Concerns

When looking at the ways in which all the changes mentioned affect the European substantive constitution, there is no escaping the overall impression that the EGD goes far beyond a mere adaptation to changing social needs. It is, indeed, a regulatory process which enriches the traditional goals of the EU substantive constitution, opens the way to a model of policy-making that implies the balancing of different public interests by political and administrative institutions, and introduces the new objective of sustainability of ecosystems rather than growth and markets.

This development is, however, problematic. Once we recognize that the EGD is identifying a new objective – that of preserving and restoring healthy ecosystems, which opens the door to "ecological primacy" – we must then admit that it is introducing in the EU legal order a concept that requires some clarity about priorities. How should the EU manage and solve possible conflicts between old and new objectives, as well as between their different rationales (sustainable development, on the one hand, ecological primacy, on the other)?

It is, arguably, easy to answer that question by observing that the existing Treaty framework provides strong protection for the traditional architecture of the EU substantive constitution, based on the pillars mentioned above, and relying on sustainable development as an overarching and unifying principle. In that legal construct, the objective of healthy and well-functioning ecosystems can be pursued as a development of environmental protection, i.e. as an instance of social regulation, but it is not protected constitutionally, as an objective that could potentially conflict with competition law and the other disciplines comprising the European substantive constitution. Accordingly, it would not be possible to adopt new environmental legislation going beyond the sustainability rationale, for example legislation asserting that the EU should avoid doing "any harm" to the environment when taking action in fields such as mobility, CO2 emission performance standards for cars, and the like. Analogously, any attempt to reinterpret existing EU legislation, for example antitrust law, in the light of ecological primacy would go beyond mere adaptation to sustainability requirements,[57] and would not be justified under the current constitutional framework.

There is, however, a less formalistic way to address the issue. In an evolutionary perspective, what the EU is facing is a conflictual process of legal adaptation and change. By identifying a new policy field, that of the sustainability of ecosystems, the EGD is promoting an EU objective which is not necessarily coherent and harmonious with the overall rationale of the EU

57. See *supra* section 4.2.

substantive constitution, which focuses on the sustainability of the market place rather than ecosystems as such. Moreover, while that objective has not yet been translated into a set of concrete actions, the Commission has already envisaged a number of legislative measures which seem to go beyond the traditional sustainability model. This is the case, for example, of the announced revision of EU legislation in areas such as land use, energy efficiency, and renewable sources of energy, explicitly connected by the Commission to the "green oath: 'do no harm'" policy principle contained in the EGD Communication and subsequently endorsed by the European Council.[58] This is not a marginal development: we are probably observing the early stages of a legal process that departs from the ecological modernization mindset to promote, through a "no harm" approach, the different rationale of "ecological primacy". Crucially, this development is supposed to take place in an unchanged Treaty framework. The Commission is bringing into the EU legal system a number of legislative proposals inspired by a policy principle which is difficult to reconcile with the EU constitutional framework,[59] without acknowledging the conflict or explaining how it could be solved. From this point of view, the EGD is not operating, at least for the moment, as a regulatory initiative harmoniously fitting into the overall constitutional framework. Quite the contrary; the EGD is operating as a genuinely destabilizing force, one generating legal conflicts between the consolidated objectives of the European substantive constitution and the emerging goal of ecosystems' biodiversity, without providing any legal or institutional tool for their resolution.

Managing the legal conflicts generated by the EGD, thus, is likely to become a key regulatory challenge in the near future; one that both European institutional actors and legal scholarship should tackle and address. This will require three things: first, identifying the main positive law issues raised by the EGD, starting with a clarification of the legal relevance of the "no harm" principle; second, exploring the possibility of a reconciliation between the principle of sustainable development and the emerging concept of ecological primacy; and third, identifying sound legal solutions without excluding the possibility of a revision of the Treaty framework.

58. See Commission Communication cited *supra* note 2, p. 19; and the Conclusions of the European Council of 17–21 July 2020, point 18, available at <consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>.

59. On the difficulty of reconciling the "do not harm" principle with the EU constitutional framework, see Sikora, "European Green Deal – legal and financial challenges of the climate change", 21 *ERA Forum* (2021), 681–697, arguing that "what the EGD fails to address and explore is the constitutional dimension of environmental protection in the EU legal order. Constitutional entrenchment of environmental protection seems to be precisely a missing point of the EGD", 690.

6. A revised understanding of prosperity?

The process of legal change triggered by the EGD is also relevant at another level. The identification of a new objective – that of preserving and restoring healthy ecosystems – sheds some light on the kind of societal order that the EGD aims to establish. In particular, it helps to recognize the revision of the ideal of "prosperity" that the EGD process implies and sustains.

Prosperity is a key element of the representation of the "new world" put forward by the Commission. In the EGD Communication, the new society is described as fair and prosperous, based on a modern, resource-efficient and competitive economy, as well as on a positive and harmonious relationship between human beings and the environment.[60] That reference to prosperity is not at all marginal. Together with peace and supranationalism, prosperity was one of the grand ideals in the foundational years of the European Economic Community, as explained by Weiler in his reflection on the founding values of the European integration process and their mobilizing force.[61] By pointing to a "prosperous" society founded on a "modern, resource-efficient and competitive economy", the EGD thus recalls and reasserts a specific root of the European integration project, one fundamental component of the trilogy (peace, prosperity, supranationalism) at the origin of the European value discourse. If that trilogy has been subsequently integrated into other values and has become part of a European *acquis*, it remains a key part of Europe's self-understanding as a Community of values.[62] It is to this self-understanding that the Commission is now appealing, with a view to sustaining and legitimizing the EGD process.

Crucially, however, the focus on prosperity is not a simple reaffirmation and modernization of a key component of the European value discourse. It also brings with it a genuine novelty. In the aftermath of World War II, the traditional understanding of prosperity as an ideal was inherently connected to human relationships, which implied a process of reconciliation; they were to be redefined within the context of an economic integration project of collective responsibility, the common market. Human beings, as well as their relations in the marketplace, were at the centre of the prosperity discourse, as indirectly illustrated by Article 2 of the original Treaty of Rome. More than sixty years later, the EGD reshapes prosperity as a value connected to the

60. Commission Communication cited *supra* note 2, p. 2.

61. See in particular Weiler, op cit. *supra* note 16; and Weiler, "Taking (Europe's) values seriously" in Hofmann and Kadelbach (Eds.), *Law Beyond the State. Pasts and Futures* (Campus Verlag, 2016), pp. 93–150, at pp. 112 et seq.

62. Weiler (2016) ibid., pp. 100 et seq. See also Craig, "Integration, democracy and legitimacy" in Craig and de Búrca, op. cit. *supra* note 17, pp. 12–45, at pp. 14 et seq.

relationship between human beings and nature.[63] Human relationships remain, of course, crucial; but they are now intertwined with a healthy environment and well-functioning ecosystems. Through the EGD, the EU acknowledges that humans are part of Earth's life systems, and that social and economic actions are ecologically bound. This implies a redefinition of prosperity, which comes to involve a process of reconciliation between human beings and nature and, perhaps most importantly, recognizes that in the interest of human beings themselves, ecological limits must have primacy over social and economic regimes.

It is not yet possible to tell whether such a reinterpretation of prosperity will be further developed and articulated by the Commission in a coherent vision capable of redefining the European fundamental values and ideals and operating as a mobilizing force for the European project. What is immediately discernible, though, is that the new phase of the European integration process envisaged by the EGD is not supposed to be a mere updating and modernization of the traditional European construct. While building on some deep values of that construct, the EGD enriches it in one remarkable way: by accepting that social and economic behaviour is ecologically bound, thus opening the way to a redefinition of the founding values of European integration as well as of how they are balanced against one another.

7. Regulatory instruments: At risk

We can now move from objectives to instruments: through which regulatory methods is the EGD supposed to achieve its goals? And how should we assess them?

It is first of all appropriate to stress that the EGD may rely on a rich and well-consolidated repository of regulatory techniques developed by the EU over the past decades. The elaboration of a variety of regulatory methods has been a complex historical process of adaptation and change, continuously building on previous developments while seeking innovative and more suitable approaches.[64] For example, the complex arabesque of experts'

63. See e.g. Commission Communication cited *supra* note 2, at p. 4, where it is stated that the EGD requires "to rethink policies for clean energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, construction, taxation and social benefits. To achieve these aims, it is essential to increase the value given to protecting and restoring natural ecosystems, to the sustainable use of resources and to improving human health. This is where transformational change is most needed and potentially most beneficial for the EU economy, society and natural environment".

64. See e.g. de Búrca and Scott (Eds.), *Law and New Governance in the EU and the US* (Hart, 2006); and Armstrong, "The character of EU law and governance: From 'community

committees that proliferated from the 1960s represented an advanced strategy to include scientific knowledge in the regulatory process, thus providing policy-makers and risk assessors with validated and applicable scientific methods and data. This led to the development of "regulatory science" in fields such as food safety, the quality of chemical products and the effectiveness of medicines. In the 1990s, the EU developed several strategies for "governing at a distance", departing in one way or another from traditional command and control. One obvious example is that of transnational networks coordinated by EU composite agencies, which operated as transnational "complexes" involving a variety of governmental and non-governmental bodies in the formulation and implementation of regulatory policies by sector. This technique was used in several sectors of the internal market, such as environmental protection, drug addiction, intellectual property, and food safety, and took a plurality of forms, including regulation by information and other information-based approaches. Other regulatory methods departed even further from the command and control method. This was the case, for example, of the Open Method of Coordination, which was elaborated with a view to implementing social service regulatory programmes in the Member States.

These and other regulatory methods responded to several needs. First and foremost, they were functional in increasing the effectiveness of existing EU legislation and Treaty rules through strategies which combined more formal processes of command and control with cooperation involving a number of public and private actors that could support the EU administration's mission. But they also aimed at contributing to the formulation and implementation of regulatory policies by sector, as well as enhancing the effectiveness of regulatory measures. Crucially, in most of these instruments, compliance was not conceived as the simple outcome of the process, but rather as a dimension of the process itself, accordingly designed as an instrument to accommodate and steer behaviour of national public powers and private parties with existing EU law and policy targets.[65]

While the EGD may exploit this rather sophisticated set of techniques,[66] it also needs to elaborate new regulatory tools. This is not simply due to the fact that regulatory instruments are evolutionary in character. It is also a consequence of the need to design methods of regulation capable of

method' to new modes of governance", 64 *Current Legal Problems* (2011), 179–214; Dawson, "Three waves of new governance in the European Union", 36 EL Rev. (2011), 208–226.

65. Chiti, "The governance of compliance, in compliance and EU law" in Cremona (Ed.), *Compliance and the Enforcement of EU Law* (OUP, 2012), pp. 31–56.

66. See e.g. the proposals to extend the Emissions Trading System (ETS) to the maritime sector (COM(2021)551) and amend the existing ETS legislation in relation to its application to aviation (COM(2021)552).

appropriately operationalizing the specific objectives of the EGD. It does not come as a surprise, thus, that the Commission – the key regulatory innovator as well as the main promoter of the EGD process – has already proposed a number of instruments that are at least in part innovative.

For example, in some specific fields such as energy, the Commission has proposed to make use of a number of rather sophisticated tools, ranging from carbon pricing as an incentive to improve energy efficiency and foster innovation[67] to changes in corporate governance rules and sustainable finance requirements,[68] with a view to combining command and control with market mechanisms. Moreover, it has made a number of proposals aimed at strengthening the enforcement of the existing legislation and policies relevant to the EGD, exemplified by the creation of a Single Market Enforcement Task Force composed of representatives of the Member States and the Commission.[69] The Commission has also proposed several "solidarity measures", i.e. redistributive measures aimed at mitigating the costs and impact of the transition, the main example being the Social Climate Fund, already mentioned above. Again, the Commission has stressed the relevance of "enabling", particularly in the field of industrial policy, as a technique to mobilize social and economic forces,[70] and it has pointed to the "empowerment" of citizens and consumers, not only through the strengthening of their rights but also through education, dissemination of knowledge, and promotion of civic engagement.[71]

It will be for future research to examine the thick pattern of continuity and change underlying the regulatory structure and process of the EGD. The task of European scholarship, in any case, is not purely empirical or classificatory. It also requires a critical discussion of the overall regulatory strategy of the EGD. From this point of view, two interconnected dimensions should be taken into consideration by research in the fields of EU law and regulatory theory and practice: that of the effectiveness of regulatory instruments and that of their legality and accountability. These are essential dimensions with which to evaluate the regulatory policies that are going to be adopted, particularly in a context in which the process is triggered and animated by the Commission, i.e. an independent supranational EU institution, and its transformative force is likely to challenge the Treaty framework, as observed above.

67. COM(2021)550, cited *supra* note 5, point 2.1.

68. COM(2021)390, cited *supra* note 23.

69. "Long term action plan for better implementation and enforcement of single market rules", COM(2021)94.

70. See e.g. COM(2020)102, cited *supra* note 6, at p. 7.

71. See e.g. COM(2020)562, cited *supra* note 9, in particular at p. 5; and European Climate Law cited *supra* note 1, Art. 9.

As for the effectiveness of regulatory instruments, it will be crucial i) to verify whether the regulatory tools laid down by the Commission are actually capable of providing the expected results of the EGD; ii) to discuss alternatives; and iii) to identify more effective means. Although specific research is needed to address these issues,[72] one should acknowledge that it is far from evident that the Commission is in the process of developing effective regulatory instruments. To start with, there may be problems in securing compliance. For example, the implementation of European Climate Law relies, among other things, on rather traditional tools of command and control based on an assessment task granted to the Commission over national and EU measures and followed by the power to adopt recommendations.[73] That is a model which is both politically understandable and legally justifiable. But is this model designed in such a way as to achieve the ambitious purpose of a continuous progress towards climate neutrality? Doubts arise when one considers its reliance on non-binding, reputational instruments, and on the elusive reference to the "spirit" of solidarity between Member States and the EU. Moreover, regulatory instruments may prove less "smart" than expected. This is true for specific tools, such as the Emissions Trading Scheme, carbon pricing and carbon tax, whose capacity to deliver on the EGD is contested and should be carefully monitored and assessed. But such questions also concern the overall regulatory architecture emerging from the Commission's various initiatives. The "Fit for 55" package, in particular, has been appropriately described as an attempt to plan "a controlled, incremental transition", with a view to providing "a social market economy which delivers good employment prospects, economic growth, environmental protection, and a bit of solidarity on the side".[74] While this gradual approach is politically understandable, it is legitimate to ask whether it is capable of achieving the ambitious goals of the EGD.

As for legality and accountability, the EGD regulatory methods will gain broad acceptance provided they meet two requirements: they must be coherent

72. See the preliminary reflections by Knodt and Schlacke, "The European Green Deal: In need of harder soft governance to reach the new European 55% climate target" (Jean Monnet Network on EU-Canada Relations, 2021), available at <carleton.ca/ces/wp-content/uploads/Jean-Monnet-Network-EU-Canada-Policy-Brief-European-Green-Deal-Knodt-and-Schlacke-Jan-2021-final.pdf>; European Risk Forum, *The European Green Deal and Better Regulation*, available at <eriforum.eu/uploads/2/5/7/1/25710097/erf_highlights_13_-_green_deal_and_br.pdf>; Siddi, "The European Green Deal. Assessing its current state and future implementation", FIIA Working Paper 114 (2020), available at <iris.unica.it/retrieve/handle/11584/313484/457281/WP114_European%20Green%20Deal.pdf>.

73. European Climate Law cited *supra* note 1, Art. 7.

74. Editorial Comments, op. cit. *supra* note 3, 1339.

with the existing Treaty framework, and they must promote rather than undermine the accountability of regulators. Again, we should admit that the EGD, in its current state of development, is problematic from both points of view. An example of the possible conflict between the regulatory instruments and the Treaty framework is provided by industrial policy. While the Commission links the elaboration of the relevant regulatory techniques to a “principle of innovation” that in its view can be deduced from the Treaties “by systemic and teleological interpretation”,[75] this statement is far from settled and it would be appropriate to identify different legal justifications for the development of a regulatory framework which is functional to innovation. As for regulators’ accountability, we can see various efforts on the side of the Commission to put in place instruments aimed at making the EU and national actors involved in the regulatory process more responsive. Yet, such instruments are not designed as complementary elements of well-accomplished “accountability regimes”, i.e. as components of sets of principles, rules and practices coherently organized in such a way as to ensure the accountability of EU and national authorities.[76] While one should not judge the EGD regulatory apparatus by idealized and over-demanding accountability standards, it should be acknowledged that its accountability mechanisms could be further developed and improved, with a view to enhancing the legitimacy of the overall process.

The evolutionary and open character of the EGD suggests that one should not already form any conclusion on its regulatory capacity. What is important to stress, though, is the risk inherent in the regulatory strategy so far developed by the Commission, assuming that we cannot take for granted its capability to address the complex challenges of climate neutrality or to meet adequate legitimacy requirements. The EGD is, for the moment, a project promoting an innovative and ambitious vision, but relying on weak regulatory tools. Developing more solid regulatory arrangements, both from a functional and a normative point of view, will be of crucial importance in order to resolve the tension between the demanding goals and the fragile instruments of the EGD.

75. See the document by the European Political Strategy Centre (EPSC), the European Commission’s in-house think tank, *Towards an innovation principle endorsed by better regulation*, EPSC Strategic Notes, issue 14, June 2016, at pp. 2 and 3.

76. On this notion of accountability regime see, in particular, Mashaw, “Structuring a ‘dense complexity’: Accountability and the project of administrative law”, 5 *Issues in Legal Scholarship* (2005), DOI:10.2202/ 1539–8323.1061. See also Harlow, *Accountability in the European Union* (OUP, 2002); Bovens, Curtin and ‘t Hart (Eds.), *The Real World of EU Accountability. What Deficit?* (OUP, 2010); Craig, “Accountability” in Arnull and Chalmers (Eds.), *The Oxford Handbook of European Union Law* (OUP, 2015), pp. 431–454.

8. Double feature: The EGD's global dimension

The future evolution of the EGD as a regulatory project must also confront the ongoing developments in the globalized legal space. Far from being an exclusively European initiative, the EGD is a project inextricably linked to, and interacting with, the various legal and institutional arrangements at work in the globalized legal space in the field of climate change and environmental protection. How does the EGD fit within the dense fabric of national and global arrangements?

Interestingly enough, the EGD is a regulatory project expressly designed to interact with one specific component of the global complex at work in the field of climate change, namely the inter-State governance developed within the UN framework.[77] Although many of the bits and pieces of the EGD require the EU and its individual administrations to coordinate their action with several international and global regimes by sector, such as the Codex Alimentarius Commission, the Commission for the Conservation of Antarctic Marine Living Resources, and the International Union for Conservation of Nature, the EGD is expressly connected, as an overall regulatory project, to the main results of inter-State cooperation. This is not surprising, given that inter-State institutions and processes obviously represent, in spite of their shortcomings and limitations, the key framework for collective action in the field of climate change and an essential component of any realistic way forward. Yet, the EGD might easily be articulated as a project not only relying on inter-State cooperation, but also strengthening the existing transnational regime for climate change,[78] exploiting its orchestration strategy and using it as a complement to inter-governmental negotiations. This is a possible and also desirable line of development of the EGD, which should become more flexible and open to the variety of processes at work in global governance.

Moreover, and most importantly, the relationship between the EGD and the main results of inter-State cooperation is ambivalent. On the one hand, the EGD is supposed to operate as a regulatory project implementing the UN legal framework at a regional level. The Commission, indeed, recognizes the shortcomings of inter-State governance, but it also makes clear that the Paris

77. Commission Communication cited *supra* note 2, point 3.

78. Such a transnational regime complex brings together private actors, such as non-governmental organizations (exemplified by Climate, Community & Biodiversity Alliance – CCBA), and networks of sub-national governments, such as cities or provinces (exemplified by Local Governments for Sustainability – ICLEI and Cities Climate Leadership Group – C40), operating across national borders. See, in particular, Abbott, "Strengthening the transnational regime complex for climate change", 3 *Transnational Environmental Law* (2014), 57–88.

Agreement "remains the indispensable multilateral framework for tackling climate change".[79] Accordingly, the EGD is an executive initiative, instrumental to the implementation in the EU legal order of the Paris Agreement and the 2030 Agenda for sustainable development. On the other hand, the EGD challenges the achievements of inter-State cooperation. Far from being a purely implementing process, it articulates and develops the contents of the UN legal framework. The EU is supposed to go beyond the current limitations of inter-State governance and to devise more ambitious and long-term strategies. The Commission is clear in arguing that the EU should act as a leader in global governance by providing "a practical example for all other regions around the world" on how accomplishing the international requirements may lead to "a more prosperous, fair, resilient and healthy world".[80] The EU is represented as the common centre point of several concentric circles. It is first of all committed to reaching the objective of climate neutrality in the European continent, but it is also supposed to support its immediate neighbours to promote multilateral cooperation within the context of the Paris Agreement, and to engage in bilateral cooperation, in particular, with major States such as the US and China. The outermost circle is that in which the EU must use its diplomatic and financial tools to establish green alliances with Africa, Latin America, the Caribbean, Asia, and the Pacific. Thus, the EGD is conceived at the same time as an executive regulatory project, implementing in the EU order a set of well-established international measures, and as an autonomous development actively contributing to making a "law of climate change" for the globalized legal space.

In this perspective, the full complexity of the EGD is apparent: it is not just a potentially important passage in the history of the European integration process, but also a tentative contribution to the global ecological transition. Its relevance is both European and global. The contribution that it can make to the development of a global law of climate change, though, is more problematic than one might think. In the globalized legal space, a variety of narratives and regulatory frameworks co-exist and confront each other. While the various green deals that are being developed around the world all tend to converge on the loose objective of climate neutrality, they differ in the envisaged regulatory solutions, the founding rationales, and the way in which ecological transition is concretely designed. Admittedly, one might describe such a legal and

79. See e.g. Commission Communication cited *supra* note 2, at p. 20.
80. COM(2020)562, cited *supra* note 9, at p. 7.

political reality as fertile ground for the mutual reinforcement and convergence of a variety of equally important normative claims, a decisive step towards the establishment of a global green deal.[81] Yet, a more realistic view would stress the conflicts inherent in the current circumstances: the green deals developed by many polities are a manifestation of global regulatory competition, and the global ecological transition that they evoke is more a battlefield than a settled and shared project – a regulatory race that each polity aims to win in order to impose its own societal, political, economic and scientific vision.

Whether and how the EGD is actually capable of shaping a new global climate law is impossible to tell at the moment. It will not be, however, a purely political process. Much will depend on legal and institutional arrangements and, in particular, on two different dimensions of the interactions between the EGD and the global complex at work in the field of climate change: first, the institutional dimension, i.e. the multiple ways in which the EU and the other regimes committed to tackling climate and environmental-related challenges mutually interact;[82] and second, the legal dimension, concerning the relationship between EU and international legal sources.[83] Both aspects are complex and involve a plurality of processes and variables. Considering the two in combination, however, should explain whether and how the EGD is going to contribute to the making of a global climate law.

81. This vision was anticipated by Barbier, *A Global Green New Deal: Rethinking the Economic Recovery* (Cambridge University Press, 2010).

82. On the manifold institutional connections between the EU, on the one hand, and global and international regimes, on the other, see e.g. Kaddous (Ed.), *The European Union in International Organisations and Global Governance* (Hart, 2015); Van Vooren, Blockmans and Wouters (Eds.), *The EU's Role in Global Governance* (OUP, 2013); Lieb, von Ondarza and Schwarzer (Eds.), *The European Union in International Fora. Lessons for the Union's External Representation after Lisbon* (Nomos, 2011); Chiti and Mattarella (Eds.), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues, and Comparison* (Springer, 2011).

83. The interplay between EU law and international law has been analysed by a rather rich literature mainly focusing on the question of the direct effect of international agreements. See e.g. De Witte, "Direct effect, primacy, and the nature of the legal order" in Craig and de Búrca, op. cit. *supra* note 17. pp. 187–227, at pp. 199 et seq.; Klabbers, "The reception of international law in the EU legal order" in Schütze and Tridimas (Eds.), *Oxford Principles of European Union Law* (OUP, 2018); Martines, "Direct effect of international agreements of the European Union", 25 EJIL 2014, 129–147; Kaddous, "Effects of international agreements in the EU legal order" in Cremona and De Witte (Eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart, 2008), pp. 291–312. See for a general account of the legal architecture of the interplay between EU and international law, Chiti, "EU administrative law in an international perspective" in Harlow, Leino and Della Cananea, *Research Handbook on EU Administrative Law* (Elgar, 2017), pp. 545–571.

9. Conclusions

This article has proposed an interpretation of the rationale and ways of functioning of the EGD as a regulatory process. The main conclusions may briefly be summarized as follows. First, the EGD is an ambitious attempt to manage the transition from the current phase of European integration to a new and more positive phase, ultimately leading – according to the Commission's intentions – to the establishment of a new societal order. Second, the new phase is not conceived as a mere modernization of the traditional European construct. The regulatory objectives of the EGD, indeed, redefine some key components of the EU substantive constitution, introducing the genuinely new objective of sustainability of ecosystems, instead of growth and market, and reshaping one of the founding values of the European integration process, namely prosperity. Third, there is a clear tension between the vision promoted by the EGD and the available regulatory tools. While the former is ambitious and challenging, the latter are rather fragile, both in functional and normative terms. Fourth, the relevance of the EGD as a regulatory process is both European and global. Its contribution to the development of a global law of climate change, however, is more problematic than one might think, given the existing regulatory competition between the various actors operating in the globalized legal space.

Though the overall rationale of the EGD is rather clear, its ways of functioning raise many legal and institutional issues. In the near future, the redefinition of some goals of the EU substantive constitution will generate legal conflicts and positive law issues directly or indirectly concerning the relationship between the principle of sustainable development and the emerging concept of ecological primacy. The available regulatory instruments raise concerns as to their effectiveness, legality and accountability. The capability of the EGD to shape a global law for the ecological transition depends, among other things, on the functioning of a large number of legal and institutional channels through which interactions between the EU and international and global regimes take place. These issues represent a great challenge for European legal scholarship, which should contribute to the simplification, rationalization, and improvement of the EGD's regulatory framework. This is not a purely technical task, aimed at addressing the regulatory challenges met by the EGD and at identifying sound legal solutions. It is, inevitably, a contribution to the making of future Europe.