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Europe and the Ecological Transition: Two (among many) Shades of Green

contributi di

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BIAGIO ANDÒ*

**Europe and the Ecological Transition:
Two (among many) Shades of Green**

Green transition is the core area chosen for the kickoff of the *Ordines* Forum, devoted to the analysis of the wide array of transitions influenced by (and impacting on) law.

Green transition evokes prima facie the necessity of a political turn in order to shelter humankind from the severe repercussions caused by climate change, weighing up economic growth and environmental protection. The legal measures to be enforced should jointly pursue them, at the same time satisfying the urge felt by national communities to increase their welfare and putting an effective restraint on the negative spill-overs on environment resulting from productive activities. The myth of the possibility of infinite growth has shown its fallacy; economic development should not anymore be an exclusive goal, having to be (made) sustainable. The imperium of economy (or better the imperium of its rationality) should be mitigated – softened – by external principles challenging the hierarchy of values designed by the former; first of all, the maximization of profit.

The selected papers look at the ecological transition from two major viewpoints: on the one hand, from a philosophical outpost focusing on the socio-cultural fundamental deep-seated values and beliefs at the root cause of legal technicalities, able to direct and curb the legislature's choices in the environmental realm; on the other, from the EU law and comparative law citadels discussing specific strategies/tools which may be adopted at a supranational level by public and private entities in order to enhance the process of green transition.

The essay written by Andrea Porciello (*Environmental Ethics and Nature Ontology. Some Critics to the idea of environmental transition*) investigates the problem of where the balance among human and nature has to be struck, and if a virtuous tradeoff may be made between the constraints on individual freedom deriving from a true ecology-based approach and some basic underpinnings of liberalism.

Porciello discusses the ways in which an environmental ethics should be conceived. He argues that the ecological transition is a window dressing concept, conveying a superficial environmental safeguard, actually leaving

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things as they are. It does not challenge the anthropocentric view – undergirding the «prevailing economic models» – of nature as «an inert and blurred background», whereas men are in «a top position », simply being a way of the «capitalist economic model [...] to pursue the usual logic of profit more effectively». A «paradigm shift, first and foremost ontological, through which human beings try to restore their relationships with the natural dimension» is necessary in order to take account of the autonomy of environmental ethics from the traditional one. A «weak version» of anthropocentrism would not be able to comply with the basic tenets of ecology. Ecology cannot but be «deep»; otherwise, it may not even be qualified as such. The only ethics fitting with a non-anthropocentric ontology is a non-anthropocentric one.

Antonio Di Marco (*The European Union green strategic autonomy: twinning two potentially conflicting objectives*) builds on the application of the concept of EU strategic autonomy (its capacity of acting in heterogeneous crucial policy areas without being dependent on other countries) to the environmental domain, highlighted by the brand-new notion of «green strategic autonomy». This conceptual merger between the distinct goals of strategic autonomy and green transition calls for a holistic approach able to overcome the «fragmentation of [EU] institutional framework» and fosters the European authorities' interventionist (top-down) attitude. By encouraging «the cross-sectoral and transversal nature of environmental policy», the concept of strategic autonomy renders it a pivotal element in the EU external action. Green strategic autonomy might be a down-to-earth winning move, permitting the killing of two birds with one stone: on the one hand, it would enable Europe to gain independence on energy and other resource imports; on the other, it would make the European economy and society climate-neutral, vesting the fundamental European values outside Europe with a knock-on effect through the enforcement of its environmental policies.

Lucia Mazza (*Green Bonds in a Green Economy*) adopts a bottom-up approach to the sphere of green transition, discussing the effectiveness of a specific kind of financial instrument gathering private economic resources for the aim of «creation of shared social value». Differently from other kinds of financial instruments, its function is not just that of providing investors with an economic return, but of getting funds not made available by state or other public bodies for green purposes. This phenomenon represents at the same time an opportunity, but also a danger. Just think of greenwashing, an appealing catchword encompassing the whole gamut of

misleading tactics aimed at inspiring the belief that resources collected from investors will be devoted to tackle environmental issues when they are not or that a company is doing more to protect environment than what it is actually doing. Hence the issue whether (and to what extent) regulation of this area in order to restrain opportunistic behaviors held by bonds' issuers is a good thing or not.

The order given in this issue to the published papers aims at highlighting the different approach to (and the assessment of) the analyzed phenomenon by the authors. The arguments made by more "skeptical" scholars (Porciello) will be compared and contrasted with those invoked by those endorsing a more "optimistic" view (Mazza and Di Marco).

The collected papers pioneer the endeavor of providing readers with specific fragments of analysis concerning the green transition, without any pretention of exhaustiveness, contributing to spur (and why not? Ignite) the debate. In the editor's view, these surveys may be considered as a stimulating point of departure, looking forward to the day when the green *transition* will let the green *tradition* go ahead.



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ANDREA PORCIELLO

Environmental Ethics and Nature Ontology *Some critics to the idea of environmental transition*

ABSTRACT - The present paper is based on the idea whereby a correct formulation of the ontological discourse about nature, in which the human being is assigned the position that actually belongs to him (for reasons that relate primarily to his biological history), as well as a correct vision of nature and the fundamental laws that govern it, they offer important indications on how the ethical discourse regarding the relationships between human beings and nature should be set up. The knowledge of natural laws, and the image of nature that derives from it, becomes a structural element of the reflection on environmental ethics.

KEYWORDS - Anthropocene - Liberal Theories - Climate Crisis - European Green Deal - Environmental Justice

ANDREA PORCIELLO*

Environmental Ethics and Nature Ontology
*Some critics to the idea of environmental transition***

CONTENTS: 1. *Introduction* – 2. *Facts and values between artificiality and nature* – 3. *Deep ecology and anthropocentrism* – 4. *Conclusions*

1. *Introduction*

The idea behind this work is simple: the only serious and realistic way to deal with the now obvious planetary environmental crisis necessarily presupposes a paradigm shift, first and foremost ontological, through which human beings try to restore their relationships with the natural dimension, increasingly corrupted and “polluted” by sinister economic logics of exploitation and profit. The idea to resolve the issue by superimposing on the erroneous perception that human beings have of themselves, as well as of the natural dimension that hosts them, impromptu legal and economic decisions aimed at protecting partial aspects of the natural dimension, as the western industrialized countries are trying to do today through their ecological transition campaigns, seems doomed to failure.

That said, the thesis that I intend to support here¹ is that a correct approach to the ontological discourse, in which the human being is assigned the position that he actually deserves (for reasons that relate first and foremost to his biological history), as well as a correct vision of nature and the fundamental laws that govern it, offer important indications on how the ethical discourse concerning the relations between human beings and nature should be set up. It would be absurd to point out what man should or should not do about the environment, without dealing with how the environment actually works. Ecology is certainly one of the areas in which the limits of the so-called naturalistic fallacy emerge most explicitly. I fully agree with Stapp when he writes lapidarily that «what is of value to us – and I hasten to add at once to add value in reference to nature – depends on

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** Contribution evaluated through a blind peer review process.

¹ For a more extensive discussion of the theses supported here, please consult my work A. PORCIELLO, *Filosofia dell'ambiente. Ontologia, etica, diritto*, Carocci, Roma, 2022.

what we believe, and what we believe is strongly influenced by science»². From this, I believe it is possible to deduce that environmental ethics cannot be classified as a variant or a special case of traditional ethics, it is a *sui generis* ethics, endowed with its own conceptual autonomy, as well as internal dynamics and issues that are specific to it. In my opinion, this makes it legitimate to support one type of foundation for traditional ethics and another for environmental ethics, without falling into contradiction.

2. *Facts and values between artificiality and nature*

In an attempt to illustrate the idea of natural ontology that I have in mind, we will first dwell on the concepts of “function” and “purpose”, first with reference to artificial entities and then with regard to natural ones, in order to understand if what we will say about the former can also be referred to the latter.

The initial idea is completely peaceful. Every artificial object is conceived and in some way is born in order to achieve a certain goal: invention is always functional to the achievement of something that conditions, at least in part, its development. I fully agree with Lon Fuller when he describes the relationship between means and ends as a *Circle of Interactions*, a circle of reciprocal interactions in which the means is always conceived with an end in view, but the end is modified and adapted to the chosen means.

That said, here are the theses I intend to discuss: 1) the use of a certain type of artificial object can always be conceived as an attempt to approximate to an ideal dimension, never in fact completely achievable given the limits that characterize human action. In other words, there is an ideal, correct way of using any artificial object that presupposes a perfect understanding of its intrinsic function, and above all of its purposes; (2) if there is a perfectly correct way of using an artificial object, there must necessarily be a completely wrong way of doing it, and between the two extremes there must also be a whole intermediate gradation of uses which degrade from ideal correctness to certain forms of error. Generalizing, and moving on to a more exquisitely theoretical level, one could say, for now with exclusive reference to the dimension of artificiality, that the understanding of the ontology of things (which also includes their function,

² H.P. STAPP, *Science, Consciousness and Human Values*, in *Mindful Universe. Quantum Mechanics and the Participating Observer*, Springer, Berlin, 2007, p. 5.

the way things work, and therefore their intrinsic purposes) offers indications on the quality of the relationships that subjects establish with them. Therefore, at least from this point of view, there seems to be no real separation between “be” and “ought to be”, between facts and values, between ontology and ethics, as a whole they constitute a fluid process in which it is impossible to draw a line that clearly separates the world of facts from that of values.

An example can be at this point of help. Let’s take the case of a musical instrument, a guitar for example. I believe that there is an ideal way to use it, which presupposes the most perfect understanding of its function, as well as all the technical and theoretical knowledge necessary for this ideal use. Such a level of correctness is just an ideal one, because it can be lapped at but never fully achieved. Even Andrés Segovia, the classical guitar virtuoso *par excellence*, stopped a step back. And the amateur who uses the guitar for the “*Sunday recital*” will necessarily fit into a gradation that will certainly see him far away from the ideal use of the instrument, but still placed on the side of the correctness of the gradation just identified. But let’s say a person uses the guitar for a purpose totally unrelated to its (ideal) function, in order to light a fire, for example, or as decoration. In these cases we can legitimately doubt that he is still using a guitar, he will at most be using an ember or a decoration that has only the shape of a guitar, since these are types of use that completely deny the ideal function of the instrument. In other words, in such cases, the relationship established can be defined as incorrect because it denies, or even harms, the ontology of the object, which contains, precisely, its function, its *raison d’être*. From what has been said, it seems to me correct to deduce this thesis: there is always a correct way of relating to an artificial object and the greater or lesser correctness, as well as the absence of correctness, depend on the greater or lesser understanding of the intrinsic purposes of the object.

The problem, as anticipated, now consists in understanding whether what has been said in relation to artificial entities can also be used in relation to natural ones, given the obvious differences that distinguish them. Let’s take the case, and also in this case in a nutshell, of a tree for example, it is not an object, although it can be conceived and used as such, it exists because it is alive, it is alive because it acts, and it acts because it pursues goals and applies strategies in view of them: in few words, the tree, as well as nature as a whole, is a subject. Yet, nevertheless, there is something that brings the tree, as a natural subject, closer to a guitar, as an artificial object, and that makes the former fall into dynamics very similar to those just

attributed to the latter. In my opinion, this is something that can be traced precisely in the concept of purpose: in this case an intrinsic purpose, natural, not imprinted by an external will (unless one accepts a creationist thesis, which is not my case), but still a purpose.

As with artificial objects, even for natural objects, a tree for example, there is a more correct way of relating to them than others, and this way appears to be directly related to the understanding of their intrinsic ends³.

3. *Deep ecology and anthropocentrism*

The discourse so far is evidently normative, in fact, we have talked about what environmental ethics "should be" and the way in which, on the basis of a correct perception of natural ontology, human beings should behave towards nature. But if we were to describe the way in which human beings really perceive themselves and have been relating to nature for centuries, the (descriptive) conclusions would appear quite different compared to the (normative) ones previously sketched.

Nature, especially in the Western culture, is considered, even by common sense, as "everything that is not human" and that, therefore, is opposed to the human being and his culture. If the holistic ontology of authors such as Naess, for example, defines the human being as part of nature and nature as a complex system of relationships, as a "network", the ontological attitude that still dominates today tends to generate an insuperable dualism, conceiving humanity as a counterpart of nature and reaching paradoxically the conclusion that acting according to nature is in fact impossible because each of our actions would be constitutively artificial as it is placed, for ontological reasons, outside and beyond nature.

It is precisely on these assumptions that traditional Western ethics has been formed, developed and stratified over the centuries, becoming the seat of that type of reasoning that feeds on capacities that are purely human, starting with logical, linguistic and cognitive ones, which has as its object exclusively the human being and his actions and which for these reasons has become the "fifth essence" of humanity (of the fact of "being" human beings), definitively marking the distance between "us" and the natural world. From this point of view, nature becomes, at most, an inert and blurred background, if not even, in some philosophies, an object, which the

³ The best-known example in modernity of a teleological philosophical approach is to be found in the work of Wolff, C. WOLFF, *Philosophia rationalis sive logica* (1728).

human being can use freely in order to derive adequate profit from it, with the approval of morality. This dualistic and anthropocentric ontological vision has contributed to the imposition, diffusion and maintenance of the current ethical paradigm, an ontology and a corresponding ethics that find their most characteristic trait in the distance between “human and non-human dimension”, and in which the intrinsic purposes of nature are completely neglected when it comes to rethinking our models of behaviour towards nature. Distance that does not only mean difference, but also and above all hierarchy, because this ontological vision assigns to the human being a top position. And the ethics that derived from these ontological presuppositions could only be anthropocentric as well, hence its incompatibility with the founding principles of ecology which, on the contrary, presupposes an ontology in which nature as a whole, and no longer the human being as a part, is at the core of its representation. The ecocentrism typical of ecology is not, therefore, a habit, it is not one of its many modes of expression, it represents, at least in the perspective advocated here, its only condition of thinkability: ecology is necessarily ecocentric.

It is for this reason that in the previous pages I have repeatedly called for a real paradigm shift, first ontological and then also ethical, because, no matter how much we may strive to find ethical solutions that are compatible with ecological reasons, the fact remains that, without a radical change, without a clear abandonment of the anthropocentric paradigm, those reasons will continue to clash with the top-down and humanist framework in which and from which we elaborate our thought, first of all, the legal and the economic ones. «We are undoubtedly faced with two antagonistic conceptions of the relationship between human being and nature: the anthropocentric one prescribes the disjunction between subject and object and determines what is specific in human beings with the exclusion of the idea of nature; the ecological one prescribes the inclusion of humans in the natural dimension and rejects the very idea of human specificity by making human being a natural being»⁴.

If, therefore, the anthropocentric attitude and ecological beliefs are irretrievably incompatible with each other, it becomes essential to understand whether the human being can really abandon the anthropocentric paradigm or whether anthropocentrism, far from being a provisional paradigm and as such surmountable, constitutes, on the contrary, the only condition, the only point of view from which the human

⁴ L. BATTAGLIA, *Alle origini dell'etica ambientale*, cit., p. 20. (Trad. mia).

being can observe and above all judge the world. Obviously, the question is crucial, because if anthropocentrism were an inevitable condition, and given its incompatibility with the spread of ecological awareness, it would mean that no truly environmental ethics, no ecocentric approach, can ever impose itself, nor find full justification.

Mainly because of these difficulties, which for many are insurmountable, some authors advocate a weak version of anthropocentrism, convinced that, with some correctives, it could be made compatible with the principles of ecology. More precisely, from their point of view, an adequate protection of nature would not necessarily require the abandonment of the anthropocentric attitude, because while keeping the human being and his needs at the core of the ontological framework, such protection would in any case be desirable to the extent that it is instrumental to the well-being (primarily economic) of humanity, which would therefore continue to constitute the only entity endowed with intrinsic value.

It goes without saying that between a contemptuous and imprudent attitude that justifies and legitimizes any choice in the environmental field on the basis of a presumed superiority of the human dimension over the natural one (hard anthropocentrism), and another that safeguards the natural dimension, not because it considers it worthy of protection as such, but because safeguarding it means indirectly improving the conditions and life prospects of the human being (soft anthropocentrism), the latter certainly constitutes, and despite its limitations, an important step forward: This second version of anthropocentrism, at least, is aware of the environmental issue and, although for the "wrong" reasons and often in completely questionable ways, believes that the environment must be protected to some extent.

The point I want to emphasize is that the fact of being aware of the existence of the environmental issue and protecting the environment to the extent that this is useful to human beings, as the supporters of the ecological transition do today, has, in truth, very little to do with an awareness that can be considered as truly ecological. In any case, one of the minimum conditions of ecology, respect for the environment "as such", would be lacking, the deontological dimension of environmental protection would be missing. And on closer inspection, without this indispensable presupposition, environmental protection cannot even be considered as a quasi-ecology, as a shallow ecology, because in practice it becomes just a way of being of the capitalist economic model that uses the language of

ecology in order to pursue the usual logic of profit more effectively. In short, anthropocentric environmental protection is not true ecology.

The various slogans of Sustainable Progress, Green Economy, Sharing Economy, typical of the ecological transition, seem to fully express this attempt to reconcile anthropocentrism (weak) and ecology (superficial). And it is no coincidence that the supporters of these slogans have no intention, either of undermining the prevailing economic models, or of rectifying ethics or reforming ontology. They only want the activities that human beings carry out on these cultural bases to be carried out “also” in compliance with certain environmental requirements, always, of course, without renouncing either profit or growth. I fully agree with Sergio Ferlito when, following in the footsteps of Naess, he states that: «all these slogans have a common goal and nurture the same dangerous illusion: they aim to give credence to the idea of compatibility between environmental protection and ecological balances on the one hand, and continuous and unlimited economic growth on the other. And since economics makes use of a robust mathematical apparatus and likes to present itself as "the queen of the social sciences", economic growth is also understood in "scientific" terms, i.e. merely quantitative, and is measured by GDP growth, which constitutes the North Star of the ruling classes all over the world. Which is one of the many examples of "ecology of bad ideas", that is, of those ideas that exchange (...) reduce quality to quantity and confuse happiness with the possession and consumption of material goods»⁵.

I fully subscribe to these considerations, first of all because I believe that anthropocentrism, both in its strong and weak versions, is always incompatible with the only form of ecology worthy of the name, deep ecology. When ecology renounces part of its own needs in order to conform to the cardinal principles of anthropocentrism (weak) and to the demands of development (including sustainable development), it inevitably ends up distorting itself, to the point of transforming itself into something profoundly different, into what Ferlito effectively defines as the ecology of bad ideas. The fact that ecology becomes “shallow” and that development wears the mask of sustainability, as Besset notes, proves only one thing, «how the economy manages to distort everything that passes through its hands»⁶. And so, suddenly, projects, products, ideas that until recently seemed completely unfeasible, because they were clearly inattentive to the

⁵ S. FERLITO, *L'ecologia come paradigma delle scienze sociali*, in *Teoria e critica della regolazione sociale*, 2, 21/2020, p. 24. (Trad. mia).

⁶ J.P. BESSET, *La scelta difficile*, cit., p. 194. (Trad. mia).

environmental issue, after a thin coat of green have become acceptable and, above all, desirable again.

At this point, an important question remains open, that one relating to the alleged conflict between ecology (which in my opinion it would be useless to continue adjectivating as deep since it does not seem to me that there really are different types of ecology) and humanism, or in other words the conflict between nature and culture. As Luisella Battaglia notes, referring in turn to Luc Ferry, «the proposal of a new ecological ethic is operated in the name of an anti-humanistic philosophy that alone, in the opinion of deep ecologists, could overturn the dominant anthropocentric paradigm to finally grant nature the rights it deserves. In this way we should move from a humanistic vision to a cosmic vision of law, in which human beings would be from the ethical, juridical and ontological point of view only one element among others. Hence the thesis of a pre-modern postmodernity»⁷. Despite appearances, Luisa Battaglia's intent is not apologetic, as is the one I have proposed in this short article, because the epilogue of her reasoning is that ecology, when set up in these terms, that is, in terms of a deep ecology, overcomes one type of dualism, between human beings and nature, between culture and nature, but produces another one between the value of nature on the one hand and the disvalue of culture on the other. What Battaglia wants to say is that the ecology of Naess and his followers, instead of resolving the dualism that prevents ecology from blossoming, limits itself to overturning it by decreeing the supremacy of nature over culture. Hence, the accusation of anti-humanism. Those who are in favour of nature in such radical terms are in some way against human beings, their science and their culture. Here are Battaglia's words about it: «the ecological problematization of the idea of nature should lead not to an essentialist metaphysics but to a richer and more complex vision, capable of recomposing the split between mind and nature, integrating those aspects obscured or removed in the anthropocentric conception of the human»⁸.

I fully understand the reasons behind these concerns and fears, but frankly I do not share them. In truth, the above criticisms would be conclusive only if the anthropocentric humanism targeted by Deep Ecology, as already mentioned, were really inevitable, if it were synonymous with humanity, with the human condition. If this were the case, it would be quite correct to define (deep) ecology as a “*contra homines*” thought, because

⁷ L. BATTAGLIA, *Alle origini dell'etica ambientale*, cit., p. 30. (Trad. mia).

⁸ *Ibidem*.

through its principles it would be unequivocally trying to discredit the only way that human beings have available to manifest themselves in history. But, as I tried to show in the first part of this work, this is not the case: «There is, evidently, no necessity of any kind, neither ideal, nor intrahistorical, nor fatal, for which one must forcibly and almost unintentionally arrive at those disastrous results»⁹. This does not mean that ecology, especially when radical, does not have its enemies, on the contrary, when it is true ecology it is normal that it has many, I am simply saying that in this group it is not correct to include the human being and his humanity. It is certainly anti-capitalist, anti-neoliberal, against (uncontrolled) growth and more generally it is obviously against the mentality of profit and inequality, first biospheric and then also social. A mentality that does not identify, however, human being as such, but only a well-diffused and deep-rooted, but nevertheless contingent, manifestation. Understood in this way, humanism no longer speaks the language of domination, hierarchy and diversity, but that of reciprocal interaction, a humanism in which the human being is conceived as a part of the whole, linked to other living beings by a relationship of kinship. The caesura of anthropocentric humanism is replaced by that of continuity, and the distance or closeness between all species becomes only a matter of degree.

With regard to the problem of the reversal of the nature/culture dualism of which Battaglia speaks, I put forward this hypothesis: those who see the presence of the reversal that ecology determines when it decentralizes the position of the human being in the biosphere, thus favoring the transition towards an ecocentric paradigm, interprets the ecological proposal in these terms simply because it uses in turn a point of view that continues to be strongly anthropocentric. In other words, I believe that deeply understanding and accepting deep ecology requires the assumption of a point of view completely detached from those anthropocentric assumptions that we automatically bring into play in our evaluation processes. In other words, ecology implies and demands the use of a point of view that, borrowing the position expressed in another field of investigation by Herbert Hart¹⁰, we could define as internal, without the use of which it will continue to appear as an anti-humanist ideology and inclined to make the natural dimension prevail over the cultural one. The assumption of the internal point of view of the ecologist gives the discipline

⁹ M. SERRETTI, *Persona e anima*, Lateran University Press, Città del Vaticano, 2014, p. 2013. (Trad. mia).

¹⁰ See H.L.A. HART, *Il concetto di diritto*, Einaudi, Torino, 2002.

a very different image and function: the de-divinization of the human being and the consequent conceptualization of nature as a set of relationships do not aim to create new hierarchies, more simply make clear the hierarchies that are immanent in the natural dimension through a renewed and more correct ontological vision. Hierarchies that reveal almost automatically one of the most important principles that govern life in the universe, or at least in the tiny part of the universe that we know: the whole comes before the parts.

Well, the idea is that this principle, when approached from an internal point of view, does not at all create a "new" and more cumbersome dualism, value of nature/disvalue of culture, it demonstrates, if anything, that (human) culture is the intellectual expression of a completely natural part and as such must necessarily always and in any case take place within the schemes, values, and purposes that are immanent in nature and that determine its proper functioning.

4. *Conclusions*

In this short article I wanted to highlight, among other things, a fundamental idea, that there is a correct way of behaving towards nature and that it can be derived, as we have tried to explain, from the facts of nature, from its ontology. As a rule, in full harmony with empiricist philosophies, I am inclined to attribute much more importance to the factual dimension, believing that in most cases it is incapable of directing human action in a normative sense. I remain convinced of the idea that the tendency to find value meanings in the facts of life is a temptation that should be practiced with extreme caution. Therefore, when, in order to solve the most classic moral dilemmas of bioethics, from abortion to euthanasia, models of ethical behaviour are found in nature, I believe that the reference to Hume and his naturalistic fallacy continues to be more than appropriate. But when we question the moral status of our behaviour with respect to nature and its well-being, the discourse changes and the reference to "facts" acquires a new and more precise meaning. In this case, the facts, which are not values, are able to tell us something about values, about the way in which nature wants to be treated, and it is from here that we should start.

This is not necessarily obvious, given that the freedom that characterizes the existential condition of human beings removes them from that automatic respect for natural laws that all other living beings

spontaneously pay them. Unlike other living beings who act instinctively "ecologically", human beings must necessarily learn to be so and, more importantly, must choose to be so.

And the first step in this direction, as we have seen, must certainly consist in the construction of an ethical model that can direct human beings towards virtuous behaviours. As always, when the ethical discourse takes over, it becomes essential to find a point of reference that is as stable and objective as possible that can serve as a basis of support for the value judgments that will make up the ethics called to discipline relations with nature as a whole. The idea supported here is that this base of support must be constituted by nature, by its deepest meaning made manifest by all its functioning mechanisms, which as a whole appear to be attributable to a simple fundamental principle: nature thrives only and only when all the parts that compose it collaborate and cooperate for the common good and the human being, although since time immemorial he continues to place himself outside (and above) the natural sphere, is, on the contrary, unquestionably a part of it subject to the rules to which all other living beings spontaneously submit. In this sense, the facts of nature, the relationships that take place within it, the laws that science has been able to deduce from all this, create an ontology that can certainly contribute to the construction of moral values.

What has emerged so far allows me to say in a very simple and direct way that nature, in all its expressions, is certainly capable of giving direction to human action: one can certainly and self-evidently say that an action is correct when it is functional to the creation of relationships that preserve or even enrich the balance of the biosphere in general and of individual ecosystems in particular, and that instead it is unfair when it undermines that balance. This does not necessarily mean professing the ideal of the inviolability of nature, as do those monks who warn insects of their passage through the use of small bells tied to their ankles, it means building relationships that are healthy and that produce advantages for both parties, always remaining aware of the fact that any interaction invariably produces changes.

Hence the conviction that anthropocentrism is incompatible with ecology because it is incapable of establishing balanced relationships that are based on biospheric balance. Anthropocentrism, at least as it has manifested itself in the West since modernity, has always been synonymous with prevarication and, therefore, functional to the creation of unbalanced and one-way relationships. Therefore, starting from a non-anthropocentric

ontology, there can only be a corresponding non-anthropocentric environmental ethics.



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LUCIA MAZZA

Green bonds in a green economy

ABSTRACT - In recent decades, interest in sustainable finance has grown. This paper aims to provide an up-to-date and critical picture of sustainable finance through a comparison of the different *green bond issuances* carried out in the European Union, a leader in the green bond equity market, and in the US. It is important to understand how the pursuit of the objective of environmental sustainability shapes the relationship between private parties and what kind of legal consequences may flow from this objective. In this sense, the critical issues caused by *greenwashing* – a phenomenon that undermines the stability and integrity of the financial system – will be discussed in the light of the world's first regulation setting up a non-mandatory definition of *green bond*. A deeper understanding of the role of sustainable finance and its positive and/or negative impacts on the ecological transition could provide concrete solutions in promoting a fairer and more resilient economy.

KEYWORDS - Sustainable finance - Green economy - Energy transition - Green bond - ESG - Greenwashing

LUCIA MAZZA*

Green bonds in a green economy**

CONTENTS: 1. *Introduction* – 2. *The evolution of the sustainable legal initiatives at the supranational level* – 3. *The green bond as a vehicle for the energy transition* – 4. *To regulate or not to regulate: that is the question in the US* – 5. *Sustainable finance legal framework in the EU* – 6. *European Green Bond Regulation* – 7. *Conclusions*.

1. *Introduction*

One of the phenomena that most challenges the contemporary legal systems is the ecological transition which requires a redefinition of public interventions to achieve high environmental standards¹. The ecological transition is the basis of the new Italian and European development model as demonstrated by the National Recovery and Resilience Plan (PNRR).

The European Union has recognised the predominant role that the financial system should play in the ecological transition because it is the most efficient means of channelling capital towards sustainable investments².

From the point of view of the principle of sustainable development, contracts may be an instrument also able to pursue collective interests. Contracts, indeed, are generally employed to satisfy private interest but they may be also useful to achieve general interest such as the environment³.

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¹ A. MOLITERNI, *Ecological transition, economic order and administrative system*, in *Rivista di diritti comparati*, 2/2022, pp. 395-452.

² A. LAS CASAS, *From green emissions to green finance. The new frontiers and the limits of private models for environmental protection*, in *Theory and Criticism of Social Regulation*, 2/2020, pp. 129-150.

³ V. CAPPELLI, *Contract and the Principle of Sustainable Development. The case of Energy Performance Contracts*, in *Rivista Quadrimestrale di Diritto dell' Ambiente*, Giappichelli, 3/2019, pp. 18-49.

However, the transition to more sustainable business models requires significant financial resources which may not be provided by public bodies and state due to the long-standing shorts fall in the national budgets.⁴ For this reason, sustainable finance can be a lever for the implementation of a different policy strategy that looks at private actions aimed at bridging this infrastructure gap⁵.

In recent years, the sustainable finance market has been constantly expanding worldwide; there has been a growing tendency to align financial objectives with environmental, social and governance (ESG) criteria⁶. This approach intervenes in the investment choice phase, expanding the traditional economic and financial analysis of issuers with considerations regarding sustainability aspects⁷. The most widespread definition of sustainable finance is in fact that of a model that combines both the long-term financial return to the investor and the creation of shared social value, including the mitigation of environmental risks and social inequalities generated by economic activity⁸.

There are two reasons why the strong growth of these financial strategies arouses the interest of scholars: on the one hand, one wonders about the effects of the phenomenon. Specifically, it is legitimate to ask whether this is a transient fashion or an authentic structural change; on the other hand, the legislator poses the problem of identifying possible opportunistic behaviours by issuers who claim that their products are sustainable when they are not, misleading investors. Since sustainable finance generates a new set of publicly available data within financial valuation models, an evolution having long lasting effects rather than a simple fashion seems to be at stake⁹. One of the most recent prominent examples of this phenomenon, in which environmental and market interests are managed through contract, is *green bond*¹⁰.

⁴ A. DEL GIUDICE, *Sustainable Finance. Strategies, market and institutional investors*, Giappichelli, Turin, 2022.

⁵ E. CROCI AND F. COLELLI, *The financing of sustainable urban projects*, IEFÉ, Milan, 2017.

⁶ Forum for Sustainable Finance, *The European Union and Sustainable Finance*, Milan, 2019.

⁷ Forum for Sustainable Finance, *Sustainable Finance and Circular Economy*, Milan, 2018.

⁸ See COM(2018) *Action Plan: Financing Sustainable Growth*, p. 2; Forum for Sustainable Finance, *Sustainable and Responsible Investing: A Definition in step with the times*, 2014.

⁹ See M. LA TORRE, *Is sustainable finance a fad? Fortunately, yes, this is how it is applied*, in *milanofinanza.it*, 2022. Consulted on 06.10.2024.

¹⁰ The *green bond* is an instrument of European derivation created by Aldo Romani, current Head of Sustainability Funding at the EIB.

As far as *greenwashing*¹¹ is concerned, it is defined such as the practice of unfairly gaining a competitive advantage by marketing a financial product as ecofriendly when fundamental environmental standards are not achieved¹². The definition of the phenomenon poses a problem itself. The success of green bonds could be promoted by containing *greenwashing*. From one point of view, it is hypothesized that greater regulatory intervention by the legislator through protection tools aimed at safeguarding investors could counter this practice by issuers. On the other, some authors argue that it would be more appropriate to have investors express themselves directly on fundamental issues concerning the environment and society¹³. One way to facilitate this is to let shareholders vote on the broad outlines of corporate policy. In this regard, the recent initiatives of the European Union which, in contrast to the US market which suffers from a lack of regulatory action by the legislator, will be discussed.

2. *The origins of the sustainable legal initiatives at the supranational level*

In 1987, the Brundtland Report of the *World Commission on Environment and Development* marked the beginning of attempts for the international community to reconcile economic development and environmental protection, meaning sustainable development that can satisfy the immediate utilities of the present generation without compromising the well-being of future generations¹⁴. The relationship between the natural environment and economic development has always been characterized by an almost oxymoronic value. Recently, indeed, there has been a shift of vision in the scientific debate from a neoclassical

¹¹ The term *greenwashing* was born in the second half of the last century. It derives from the deformation of “whitewash”, literally “to whitewash”, which in a broader sense includes the meaning of “hiding”. Many authors trace the 1986 essay by environmentalist Jay Westerveld as the origin of the term *greenwashing*. However, there are no definitive citations provided for the essay, nor is the Westerveld essay available online. See M. A. CHERRY, *Corporate Social Responsibility and Crowdfunding in the Gig Economy*, in *Saint Louis University Law Journal*, Vol. 63, No. 1, 2018, pp. 1-20.

¹² Cons. 11, Regulation (EU) 2020/852.

¹³ O. HART AND L. ZINGALES, *Companies Should Maximize Shareholder Welfare Not Market Value*, in *Journal of Law, Finance, and Accounting*, 2 (2): 247-274.

¹⁴ L. DONATO, Bank of Italy and Sidief, *The long march of ESG factors. Between regulation and the market*, in https://www.astrid-online.it/static/upload/04-d/04-donato_35_46.pdf, last access on date 03.04.2024. The reader must pay attention to the citations of the dates which will be indicated according to the US criterion, placing the month before the day.

perspective à la Milton Friedman – i.e. one which aspires to the achievement of the maximum efficiency by companies within the law is boundaries and to the satisfaction of minimum ethical constraints – to an anthropocentric vision, which tends to have a broader perspective, taking into account the influence of stakeholders' attitudes in the pursuit of corporate objectives¹⁵.

In 1992, at the *United Nations Conference on Environment and Development* (UNCED), representatives from 172 countries recognized the need to act collectively to protect people and the environment by reducing greenhouse gas emissions¹⁶. Thus, 1992 marks the starting point for a huge development of the concept of sustainability, which rooted in the protection of the environment, has progressively evolved over time. What emerges is a view that a model of sustainable economic growth must necessarily take into account both aspects of environmental and social nature, as well as governance of the subjects – both public and private – who participate in decision-making processes.

In the "Who Cares Wins" report drawn up by *the United Nations Global Compact Initiative*, the acronym ESG (Environmental, Social, Governance) was introduced, setting out these three important pillars of sustainable development¹⁷. Subsequently, many initiatives were born and affirmed the relationship between sustainable development and environmental, social and governance criteria at a global level. In 2015, almost the entire international community participated in the adoption of two fundamental documents, the Paris Agreement and the 2030 Agenda¹⁸. The governments participating in the former agreement set themselves transparency targets on results achieved in the action plans every five years, while the EU Member States and other developed countries also agreed to support developing countries, with the aim of facilitating them in the fight against

¹⁵ See M. FRIEDMAN, *Capitalism and Freedom*, University of Chicago Press, Chicago and London, 1962; A. TAMI, *Beyond the Bank. Towards Sustainable Finance: From Economic and Financial Analysis to ESG Analysis*. Franco Angeli, Milan, 2017, passim; A. SCHIOPPI, *Sustainable Finance: a new paradigm*, Youcanprint, Lecce, 2022.

¹⁶ In that occasion, the convention was drawn up. The agreement represents an important legal response to climate change because it sets up the *principle of Common But Differentiated Responsibilities* (CBDR). According to it, the countries of the international community set themselves the goal of developing a different conception of the responsibility of States in order to achieve a fair redistribution of the normal characters between them.

¹⁷ L. DONATO, *La lunga marcia*, cit.

¹⁸ This agreement sees the contracting states committed to stabilizing the increase in the global average temperature below 2°C compared to pre-industrial levels, seeking to bring the value to 1.5°C.

climate change¹⁹. Meanwhile, the latter was signed within the framework of the UN: seventeen goals have been identified in the document, *Sustainable Development Goals* (SDGs), explained in the three dimensions of economic, social and environmental governance, in accordance with the objectives of the Rome Declaration, the follow-up to the 2021 G20²⁰. The official launch of this programme was scheduled for 2016 with the aim of achieving these goals by 2030²¹.

In the light of the challenges emerging from the above documents, in 2019, the European Union declared its new strategy, commonly known *European Green Deal* (EGD), with the intention of "becoming the first climate-neutral continent"²². In order to win the fight against climate change and environmental degradation, the Council argues that it is necessary to transform the European Union in a modern economy able to be both competitive and resource-efficient. The new European agreement provides zero greenhouse gas emissions by 2050, economic growth must be decoupled from resource use and, finally, individuals and countries must be protected from environmental damage and impacts, excluding no one. The European Commission presented the *European Green Deal* to the European institutions on 11 December 2019²³. After a healthy debate in the European Parliament, this latter decided to support this new strategy, stressing, however, that more action was needed to bring about a just transition without leaving anyone behind²⁴. It should be emphasised that

¹⁹ See N. TOMAKI, *The Paris Agreement: continuity and change within the climate regime*, in N. CRAIK, C. S. G. JEFFERIES, S. L. SECK, T. STEPHENS (eds.), *Global Environmental Change and Innovation in International Law*, Cambridge, 2018, pp. 42-70; S. NESPOR, *The Long March for a Global Climate Accord: From the Kyoto Protocol to the Paris Agreement*, in *Rivista Trimestrale di Diritto Pubblico*, 2016, pp. 86-122.

²⁰ W. COLGLAZIER, *Sustainable Agenda: 2030*, in *Science*, Vol. 349, 2015, pp. 1048-1050.

²¹ More specifically, the goals set out in this document consist of "common goals" in the sense that they concern all countries and individuals in the world on a set of important issues for development such as, for example, the fight against poverty and climate change.

²² European Commission, *a European Green Deal. Aim to be the first climate-neutral continent*, consultable on https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_it.

²³ COM(2019) 640 final, *Communication from the Commission to the European Parliament, the Economic and Social Council and the Committee of the Regions. The European Green Deal*, Brussels, 2019, available in https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0006.02/DOC_1&format=PDF.

²⁴ European Commission, *European Green Deal Communication: Turning the European Green Deal into a Europe's man on the moon moment*, Brussels, 2019, consultable on https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF.

the EGD is not a law but a general political strategy, which outlines ambitions and objectives in different policy areas. In order to implement it in all Member States, regulations and standards for coming years have to be revised in accordance to implementation of new laws and directive²⁵.

In this vein, the European Union has taken the lead in the promotion of sustainable finance, through strategies among which the *Sustainable Finance Action Plan*, better known as the *Action Plan*, is of primary importance. This is the European Commission's program within which the strategy and the consequent measures to be adopted are outlined, with the main intention of achieving a financial system that can be economically, socially and environmentally sound²⁶. The European Council suggests to adopt a holistic and sectoral approach in which all relevant policy areas contribute to the ultimate climate goal. The package includes initiatives covering climate and environment as well as transport, industry, agriculture, and sustainable finance, all of which are closely interlinked. All these objectives were implemented, in 2020, by the Next Generation EU. The program envisaged part of the scenario outlined by the Green Deal as already considered and was a response to face up the economic crisis caused by the Covid-19 pandemic.

3. *The Green Bond as a vehicle for the energy transition*

Sustainable finance has for the first time been defined by the European Commission as «the process of taking environmental and social factors into account in making investment decisions in order to achieve greater investment in sustainable and long-term activities»²⁷.

²⁵ There are eight key areas that make up the Green Deal: increasing the EU's climate ambition for 2030 and 2050; supplying clean, affordable, secure energy; mobilizing industry for a clean and circular economy; building and renovating in an energy and resource efficient way; a zero-pollution ambition for a toxic-free environment; preserving and restoring ecosystems and biodiversity; farm to fork: a fair, healthy and environmentally friendly food system; accelerating the shift to sustainable and smart mobility. See I. BERETTA, S. PALEARI, S. TAGLIAPIETRA, R. ZOBOLI, *European Green Deal: project for an incomplete revolution*, in B. BOSCHETTI, *FuturAP – Report on the Future and Innovation of Public Administration*, EDUCatt, Milan, 2022; C. FETTING, *The European Green Deal*, ESDN Office, Vienna, 2020.

²⁶ COM(2021), *Action Plan on synergies between civil, defence and space industries*, Brussels.

²⁷ COM(2018), *Action Plan: Financing Sustainable Growth*, p. 2.; in principle, sustainable finance aims to «create value in the long term, directing capital towards activities that not only generate economic added value, but are at the same time useful to society and are not

Among the forms of sustainable finance is the so-called *impact investing*, which can be considered a subset of socially responsible investing. Unlike investing that considers environmental or social risks in financial processes as a secondary aim, *impact investing* makes social or environmental impact a primary objective of the investment, its *raison d'être*²⁸. This category must include all those hypotheses in which capital is invested both because of the profitability of the investment and the social and environmental objectives that the investment aims to achieve²⁹. Therefore, the investor's effort occurs both *ex ante* (i.e. to select the investment that connects the financial return to the social or environmental objective and the contractual design) and *ex post* (i.e. the monitoring phase of the proceeds' use and verifying the outcome of the financed projects)³⁰. Green bonds are one of the most well-known forms of *impact investing* and 'thematic bonds'. In recent years, the spread of green bonds has also been boosted by the Paris Agreement. The increase of green bonds in the Italian market is linked to the widespread attention to sustainable growth following the Covid-19 crisis and, at the same time, to the implementation of the European Union's Next Generation plan³¹. The government issuers have also contributed to the increase of the overall volume of issuance, which to date amounts to over one trillion dollars; most of this type of bond is issued by large corporations and there are three phenomena discussed in

borne by the environmental system», "Sustainable finance" available on the Consob website <https://www.consob.it/web/area-pubblica/finanza-sostenibile>, last access on date 03.30.3024.

²⁸ In the financial markets, the most widely used formula is that of "sustainable and responsible investment", better known as "SRI": the expression refers to that type of investment through which wealth is allocated according to the traditional 'investment-return' scheme, where, however, environmental, and social factors are integrated into the processes of research, analysis and selection of the investments themselves. The substantial difference with *impact investing* lies in the fact that in SRI the sensitivity to environmental and social impact is mainly reflected in the selection techniques of the subjects or projects to which the investment is addressed. These forms of finance are in the wake of the broader and older debate on the subject of social and corporate responsibility (the literature is very extensive on the subject, see B. CARROLL, *Corporate social responsibility, Evolution of a Definitional Construct, Business & Society*, 1999, pp. 268-295; H.R. BOWEN, *Social Responsibilities of the Businessman*, University of Iowa Press, 1953, p. 6; M. LIBERTINI, *Social Market Economy and Corporate Responsibility*, in *Orizzonti del diritto commerciale*, 2013, pp. 1 ss.).

²⁹ D. LENZI, *Impact finance and green and social bonds. Cases and regulations between special rules and general principles*, in *Banca Impresa Società*, n. 1, Il Mulino – Rivisteweb, 2021.

³⁰ A. DEL GIUDICE, *La finanza*, cit.

³¹ L. DONATO, *La lunga marcia*, cit.

the financial literature that can explain what drives companies to use this form of financing. First of all, the *signalling argument* gives the issuer a consolidated reputation in the field of activity and, therefore, a greater appreciation by the market; secondly, there is the explanation provided by the *greenwashing argument*, according to which the possibility of deceiving the market by obtaining the reputational benefit but without a concrete environmental objective due to the absence of specific regulation cording which; finally, the *cost of capital argument* may be a powerful incentive companies attentive to sustainable issues have a lower exposure to risk evidenced by many empirical studies. These businesses have a lower cash flow volatility and a greater risk protection, thus justifying the existence of a discounted yield on the debt issued³².

From the observation of market practices and in the absence of a regulatory definition, green bonds can be defined as financial instruments attributable to investments in debt capital issued and subscribed to make possible an environmental benefit. In our legal system, then, green bonds can be traced back to the category of bonds in the strict sense, yet showing some distinctive features³³.

The shared characteristic by both types is that return of the capital invested by the investor (plus interest), within a predetermined period of time is provided³⁴. By contrast, what distinguishes green bonds from ordinary bonds lies in the fact that the proceeds from green bond issues are

³² See L. ATKINSON and S. ROSENTHAL, *Signaling the Green Sell: The Influence of Eco-Label Source, Argument Specificity, and Product Involvement on Consumer Trust*, in *Journal of Advertising*, 43(1), 2014, 33–45, <https://doi.org/10.1080/00913367.2013.834803>, last access on date 04.02.2024; M. A. DELMAS and V. C. BURBANO, *The Drivers of Greenwashing*, in *Forthcoming California Management Review*, 54(1), pp. 64-87, 2011. <https://doi.org/10.1525/cm.2011.54.1.64>, last access on date 04.02.2024, M. KELOHARJU, J. LINNAINMAA and P. NYBER, *Do You Really Know Your Cost of Capital?*, in *Journal of Applied Corporate Finance*, 34(3), 2022, pp. 116-128, <https://doi.org/10.1111/jacf.12523>, last access on date 04.02.2024.

³³ Green bonds are not individual loan contracts but financial instruments intended as securities and mass transactions, standardized fractions of a unitary transaction which, as such, can only be issued by joint-stock companies and limited partnerships pursuant to art. 2140 et seq. of the Italian Civil Code, by joint-stock cooperative companies, pursuant to Article 2526 of the Italian Civil Code, and by banks; on this issue, see, for example, M. STELLA RICHTER JR., *Financial Instruments and Joint-Stock Companies*, in AA. VV., *The Reform of Company Law Ten Years Later. Per i quarant'anni di Giurisprudenza commerciale*, Milano, Giuffrè, 2015, pp. 53 ss.

³⁴ M. DALLOCCIO and E. TETI, *My name Is Bond, Green Bond*, in *bocconi.it*, 01.17.2023, consultable on <https://www.unibocconi.it/en/news/my-name-bond-green-bond>, last access on date 05.05.2024.

reinvested in financed projects that can foster the environmental and energy transition. Example of green bonds are those projects with the aim of contributing to the development of zero-emission mobility, the energy renovation of abandoned homes or public/private buildings for commercial use, or the development of renewable energy. Other examples are the conversion of energy production systems or the construction of a building with reduced energy impact for the market.

In this scenario, the investor's capital is rewarded both by the interest rate (the so-called "coupon") and by the benefit that derives from the achievement of a sustainable goal³⁵. Investors are attracted by green bonds despite their seemingly low rate of return and possible loss of capital³⁶.

The weak point of these tools lies in the disorganicity of the regulatory framework, caused due to the preference for self-regulation. The legal framework appears to be piecemeal because neither specific information duties concerning on the sustainability of financial instruments have been introduced, nor have requirements for the management and composition of the reference indices. Moreover, a classification that qualifies investments as eco-sustainable is absent. This seems to be a political choice letting investors and issuers forge new practices, the underlying assumption being that an overly regulated approach could discourage investors and slow down the growth of green bonds³⁷. The opacity of the functioning of the market was therefore addressed mainly through soft-law instruments aimed at increasing investor confidence and thus encouraging the development of green finance. In fact, private entities have developed green 'certification' systems of financial instruments based on compliance with certain standards set by the entities themselves, and on the assignment entrusted to third parties of green certification of these products³⁸. It's the so-called *Second party options* coming from external auditors who verify the bond issuance process, i.e. insert the bond in specific stock market indices which measure the performance of baskets of green bonds compared to similar 'ordinary' bonds. On the one hand, the higher effort of issuing this type of bond derives from the independent auditor, who is responsible for certifying the alignment of the bonds with ESG criteria. On the other, the

³⁵ A. LAS CASAS, *op. cit.*, p. 138.

³⁶ D. LIBERATI and G. MARINELLI, *Everything you always wanted to know about green bonds (but were afraid to ask)*, in *Questioni di Economia e Finanza*, 654/2021, pp. 5-32.

³⁷ See *infra* p. 20.

³⁸ Currently, third parties usually develop green certifications; other times, especially in the past, the issuers themselves certified their products as sustainable.

issuance of these bonds also sends a very positive signal to investors, since figures show a trend of growth in their value over the long term³⁹. In this sense, it is up to the issuers to decide what is green, since it's the latter that must have clear criteria to confirm the suitability of a project for financing, as well as to allow the traceability of the resources used⁴⁰. Currently, the legislator has provided an unclear definition. By green bonds the International Capital Market Association (IMCA) means bonds whose proceeds are used exclusively to finance new or existing environmental projects⁴¹. In the context of the global market, the IMCA has developed a legal framework of reference – the so-called "Legal Framework" or *Green Bond Principles* (GBP) – which are guidelines for green bond issuers and investors looking for useful information to assess the environmental impact of their investments. They have represented the main point of reference and are achieved through soft law instruments that do not provide for substantial enforcement mechanisms. GBPs, like the *Climate Bonds Standards* (CBS), are voluntary guidelines concerning the appropriate use of funds, the project selection process, and reporting phase. These guidelines are mainly of procedural nature. There are four aspects of the financial operation considered fundamental by ICMA: *use of proceeds, process for project evaluation and selection, management of proceeds and reporting*. However, the *Green Bond Principles* have considerable criticism regarding the content attracted aspects: there is a non-exhaustive list on the green nature of projects, which list some *Green Project categories* by way of example⁴². This has led to a weakening of the very definition of 'green' and the threshold that marks the possibility of qualifying a product as such, exposing these instruments to a greater risk of *greenwashing*.

4. *To regulate or not to regulate: that is the question in the US.*

Initially, these new bonds were issued by supranational financial institutions, such as the World Bank in 2008 and the European Investment Bank (EIB) in 2007; subsequently, individual companies, municipalities and

³⁹ L. DONATO, *The Long March of ESG Factors*, cit.

⁴⁰ A. LAS CASAS, *op. cit.*, p. 139.

⁴¹ The Green Bond Principles, International Capital Association (IMCA), 2021.

⁴² ICMA's list includes energy efficiency, green building, sustainable agriculture, renewable energy and the water cycle.

state agencies began to issue securities on the regulated market⁴³. Soon, in fact, in US corporate issuance of green bonds spread exponentially, rising from twenty-seven billion dollars in 2014 to more than thirty-four billion in 2016: the largest dollar issuance (one point five billion) was made by Apple in 2016, and constituted a milestone in the green bond sector ⁴⁴. Apple funded a project aimed at dismantling scrapped iPhones and recovering recyclable materials such as silver and tungsten. Thanks to the investment made in the design of a robotic system with these purposes, Apple has contributed to the energy transition because it has intensified research into more eco-sustainable materials for its products and has recycled obsolete devices⁴⁵. The Apple case is emblematic in the US because the financial performance turned to be highly successful, and the environmental sustainability objective fully achieved, causing the extraordinary peak of green bonds in those years in the US market.

Regulation of environmental, social and governance (ESG) practices, including green bond standards in the US is limited to disclosure. On March 2024, the Securities and Exchange Commission (SEC) amended the rules contained in the *Securities Act of 1933* (“Securities Act”) and *Securities Exchange Act of 1934* (“Exchange Act”), requiring registrants to provide certain climate-related information in their registration statements and annual reports and mandating specific disclosures related to severe weather events and other natural conditions will be required in a registrant’s audited financial statements⁴⁶. Meanwhile at the state level, various governments have begun to try their hand at the green sector: for example, Delaware, known for its corporate law, recently passed a statute regulating the ESG disclosures of companies residing in the state in June 2018, and adopted for Delaware businesses the *Sustainability and Transparency*

⁴³ I found this information in Borsa Italiana’s website, *What are Green Bonds*, in <https://www.borsaitaliana.it/notizie/sotto-la-lente/green-bond-definizione.htm>, last access on date 05.06.2024.

⁴⁴ Natixis Investment Managers, 2017, in <https://www.im.natixis.com/en-institutional/insights/green>, last access on date 06.03.2024.

⁴⁵ See M. L. LIPSON and R. O'BRIEN, *Apple Inc.: The Second Green Bond*, Darden Case No. UVA-F-2022, available at SSRN: <http://dx.doi.org/10.2139/ssrn.4331891>, last access on date 05.10.2024; see I. MATTA, *Green Bonds: a case study of Apple, Verizon, Pepsi and Walmart’s green corporate bonds*, Ohio University, 2022.

⁴⁶ Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 03.06.2024. These final rules are effective on 05.28.2024. The reader must pay attention to the citations of the dates which will be indicated according to the US criterion, placing the month before the day.

*Standards Act*⁴⁷. In California, according to the *California Climate Corporate Data Accountability Act* establishes that from 2026 all large companies will have to report their energy consumption and greenhouse gas emissions to the state for the year before. California law seems to go beyond the regulations proposed by SEC, because it would apply to both public and private companies (whereas SEC regulates only public firms)⁴⁸. However, apart from the aforementioned legislation, the US green bond market remains unregulated. Currently, at the federal level disclosure is mandatory for public companies, the rest remains self-regulating. The voluntary nature of green bond disclosures in the US creates a lag in market growth because investors are unsure how financial instruments will be traded⁴⁹. While green bond markets have grown rapidly in Europe and Asia, the US is experiencing a setback, despite the fact of being the second largest producer of greenhouse gases. Similarly to the European one the US green bond market remains entirely voluntary and largely self-regulatory system since it uses GBP guidelines. Therefore, the US do not has yet attempted to offer a definition of green bonds, nor has it created regulations on green bonds⁵⁰. In this context, Europe is the frontrunner in the green bond equity market, with Germany and Italy emerging as the top issuers of green bonds in the third quarter of 2022. Indeed, Germany has invested sixteen billion dollars, mainly in the form of government bonds, while in Italy a sovereign issue worth six billion euros was launched in September 2022⁵¹. The US market is mainly driven by sustainable, responsible and *impact investing* funds, but pension funds are only at the beginning of the green bond investment venture compared to the European market, where pension funds reach high levels⁵².

Anyway, it may be asked why more green bonds have not been subscribed in the US market today. The lack of regulation in the sector

⁴⁷ C.M. BANAHAN, *The Bond Villains of Green Investment: Why an Unregulated Securities Market needs government to lay down the law*, in *Vermont Law Review*, Vol. 43, No. 4, 2019, pp. 841-870.

⁴⁸ F. FABBRI, *California, dal 2026 le aziende dovranno rendicontare consumi energetici ed emissioni di CO₂*, in *Energy Italia News*, 10.02.2023. Consultable on <https://www.energiaitalia.news/policy/policy-mondo/california-dal-2026-le-aziende-dovranno-rendicontare-consumi-energetici-ed-emissioni-di-co2/20034/>, last access on date 05.13.2024.

⁴⁹ *Ibidem*

⁵⁰ E.K. WANG, *Financing green: reforming green bond regulation in the United States*, in *Brooklyn Journal of Corporate, Financial & Commercial Law*, Vol. 12, 2/2018, pp. 467-491.

⁵¹ M. MINENNA, *Over-regulated ESG emissions*, published in «Il Sole 24 ore», 12.11.2022.

⁵² E.K. WANG, *Financing green*, *cit.*

seems to hinder a substantially progressive environmental impact⁵³. The application of the voluntary principles laid down by ICMA is not without issues, such as the lack of accountability and enforcement mechanisms along with minimum disclosure requirements and the absence of penalties for violators⁵⁴. In fact, issuers' promises to use the proceeds of green bonds in environmental projects are not contractually binding. In the analysis of risk factors related to *greenwashing* contained in the Apple's 2019 green bond prospectus, its potential investors are warned that any guarantee is afforded to them that the environmentally friendly projects will meet investors' expectations, nor does Apple promise that the green investments will be free from negative environmental or social impacts⁵⁵. This could pose a problem, since a company can sell bonds dubbed or denominated as 'green' to take advantage of tax exemptions, but then "greenwash" the bond by investing the proceeds for purposes that do not serve the good of the environment. In addition, there are limited mandatory transparency requirements on how proceeds from green bonds are used, and even fewer ways to redress issuers that misappropriate green bond proceeds⁵⁶. The ICMA and CBS guidelines are both voluntary, and there are no mechanisms to enforce them. While the US is unripe green equity market, Europe and China seem to continue to move forward for green investing. Indeed, the EU and China have recently enacted regulations specifically addressed to green bonds⁵⁷. Many countries, including China, are taking action to balance the weight of fossil fuels in the energy mix with new investments in order to reduce greenhouse gas emissions⁵⁸. Indeed, some national systems, such as the Chinese, have relied on top-down regulation mechanism. Green bond rules have been issued by market regulators in China and India, which defined more flexibility sustainable assets for the

⁵³ G.A. AKERLOF, *The markets for "lemons": Quality uncertainty and the market mechanism*, in *Quarterly Journal of Economics*, Vol. 84, 3/1970, pp. 488-500.

⁵⁴ L. TROMPETER, *Green is Good: how green bonds cultivated into Wall Street's environmental paradox*, in *Sustainable Development law and policy brief*, vol. XVII, 2/2017.

⁵⁵ Y. WANG, *Mitigation Greenwashing Concerns in the Green Bond Market*, University of Toronto, 2023.

⁵⁶ E.K. WANG, *Financing green: reforming green bond regulation in the United States*, in *Brooklyn Journal of Corporate, Financial & Commercial Law*, Vol. 12, 2/2018, pp. 467-491.

⁵⁷ S.K. PARK, *Investors as regulators: Green Bonds and the Governance Challenges of the sustainable finance revolution*, in *Stanford Journal of International Law*, Vol. 54, no. 1, 2018, pp. 1-48; cf. W. D.

⁵⁸ I found this information in Borsa Italiana's website, *What are green bonds*, in <https://www.borsaitaliana.it/notizie/sotto-la-lente/green-bond-definizione.htm>.

purposes of qualifying their financial instruments⁵⁹. However, in some cases, this type of regulatory framework has shown that issues labelled green in accordance with the *Green Bond Principles* did not trigger benefits in terms of social and environmental sustainability. China's green bond market is subject to public regulations issued by the People's Bank of China (PBoC), China's central bank, since 2015. The PBoC regulates China's interbank bond market, which accounts for ninety-three percent of bonds in China⁶⁰. According to an analysis by Carbon Brief, China's investment in renewable energy increased forty percent year-on-year in 2023, reaching six trillion yuan (eight hundred and ninety billion dollars), nearly equivalent to the total global investment in fuel supply in the same year or to the GDP of countries such as Switzerland or Turkey. This suggests that the sector has been the main driver of the country's economic growth, accounting for forty percent of the GDP expansion in the past year alone⁶¹. In recent years, both China and India have adopted more official regulations, but most compliance regulations are still voluntary. In order for the green bond market to continue its growth and expansion in the US, the legislator at a national level must establish clear regulation for green bonds and prevent companies from *greenwashing* or otherwise misleading practices investors about the purported climate-related benefits. A green bond framework similar to that currently in place in China could help some investors' concerns about the quality of green equity products⁶².

5. Sustainable finance legal framework in the EU

The need for a solid regulatory framework for green bonds stems from the need to prevent attempts at *greenwashing*, a phenomenon that puts at

⁵⁹ H. ZHANG, *Regulating Green Bonds in the People's Republic of China: Definitional Divergence and implications for Policy making*, ADBI Working Paper 1072, 2020, in <https://www.adb.org/sites/default/files/publication/562076/adbi-wp1072.pdf>, last access on date 05.02.2024.

⁶⁰ D. GUO AND P. ZHOU, *Green bonds as hedging assets before and after COVID-19: a comparative study between the US and China*, in *Energy Economics*, Vol. 104, 2021, pp. 1-11.

⁶¹ M. CASSANO, *Le Tecnologie green che hanno trainato l'economia cinese nel 2023*, in *Qualenergia.it*, 01.29.2024, consultable on <https://www.qualenergia.it/articoli/tecnologie-green-trainato-economia-cinese-2023/>, last access on date 05.02.2024.

⁶² C.M. BANAHAN, *The Bond Villians*, *cit.*

risk the stability of socially responsible finance *tout court*⁶³. The long and intense regulatory activity by the competent authorities has led to a progressive development of sustainable finance within the European Union. The main aim is to direct financial operators towards the integration of sustainability-related risks in investment processes and consolidating information transparency towards ending customers tag⁶⁴. Indeed, the EU Regulation 2019/2088 of 27 November 2019, also known as the "Disclosure" Regulation, relating to sustainability-related disclosures in the financial services sector (SFDR), adopted as part of the Action Plan is worth of being considered⁶⁵. The regulatory act is also effective in implementing the Paris Agreement and following the guidelines of the United Nations 2030 Agenda⁶⁶. However, the European legislator has introduced a classification of activities that can be considered sustainable and has imposed the dissemination of a specific set of information for those products that promote environmental and social elements, such as, for example, *light green products*; or again, those products that have sustainable investments as their ultimate objective, such as, for example, *dark green products*⁶⁷. The first type includes financial products that also promote environmental or social characteristics (or a combination of these) ex art. 8. According to this provision, publicly-traded companies have to abide by good governance practices and the information duties posited by art. 6 rule, having to show how sustainability risks are integrated in their investment decisions and are assessed as to the expected risks of performance of their financial products.

⁶³ The European Union's actions also include the establishment of the Technical Expert Group on Sustainable Finance (TEG) in 2018, with the task of assisting the European Commission in the development of the European taxonomy for sustainable activities, for the development of European green bond standards (see *infra* p. 21) and for improving corporate disclosure of environment-related information. Available at <https://finance.ec.europa.eu/publications/technical-expert-group-sustainable-finance-teg-en>.

⁶⁴ F. CONTE, *La Finanza Sostenibile*, cit.

⁶⁵ For a clearer picture of the European regulatory framework for sustainable finance, one may consider the Paris Treaty of 2015; Directive 2014/95/EU NFRD the first European directive on the disclosure of non-financial information; Regulation (EU) 2016/1011 (Climate Benchmark) establishing benchmarks in financial instruments and financial contracts; Regulation (EU) 2020/852 (Taxonomy) establishing the framework to facilitate sustainable investment (*infra* p. 19); and the Directive (EU) 2022/1214 Corporate Sustainability Reporting Directive. Finally, the new regulation on the European Green Bond Standard will be discussed later (*infra* p. 21).

⁶⁶ L. DONATO, *The Long March of ESG Factors.*, cit.

⁶⁷ Pursuant to the artt. 8 and 9, Regulation (EU) 2019/2088.

Art. 8 provides for the criteria ruling the description of the environmental and social constituents underlying financial products, as well as indicating to what extent the reference index. Finally, what is the methodology used to calculate the indices. The second category includes financial products that have sustainable investments as their objective ex art. 9. Beyond the information to be communicated pursuant to art. 6 (par. 1 e 3), it has to be highlighted the designated index is in line with the objective of sustainable investment. Furthermore, it must be explained why and how the designated index is different from a general one. However, art. 9 provides for an exception to par. 2, where both the Benchmark and an EU Climate Transition Benchmark as well as an EU benchmark Paris Agreement aligned⁶⁸ are not available, the information shall include a detailed explanation of how the objective (or the goal of reducing carbon emissions) is achieved.

The disclosure has two aspects: on the one hand, pre-contractual information on sustainability risks and impacts on investment returns is taken into account⁶⁹; on the other, it also includes the information published and disseminated through websites where it is possible to find policies on the integration of environmental sustainability risks and the description of the negative effects on sustainability factors of the activities carried out⁷⁰. As regards the first aspect, it seems clear that the European legislature envisages the conclusion of a contract between the final investor and the financial market participant. In the tenth and twelfth *considerandum*, there is a clear reference to information provided in the preparation of the contract concerning a financial product or financial advice, where financial market participants and financial advisers are obliged to make pre-contractual and ongoing disclosures to end investors, and also reference to due diligence before making the investment. Indeed, the innovative element of the SFDR Regulation concerns the new definition of "sustainability risk", understood as «an environmental, social or governance event or condition that, if it occurs, could cause a significant negative impact on the value of the investment, as specified in the sectoral legislation». The European Regulation introduced harmonised rules on sustainability-related disclosures as there is insufficient development of disclosures to end-investors on the integration of sustainability risks and their adverse effects. This is especially true if we consider that the lack of

⁶⁸ In accordance with (EU) Regulation 2016/1011 of European Parliament and Council.

⁶⁹ Art. 6, Regulation (EU) 2019/2088

⁷⁰ Artt. 3 and 4, Regulation (EU) 2019/2088

harmonised transparency rules is an obstacle to effective comparison for end-investors of different financial products in the Member States.

In this context, the subsequent Regulation (EU) 2020/852 of the European Parliament and of the Council (*Taxonomy Regulation*) on the establishment of a framework to facilitate sustainable investments and amending Regulation 2019/2088, adopted on 18 June 2020, published on 22 June 2020 and entered into force on 12 July 2020, provides additional disclosure obligations for financial market participants pursuant to art. 5. It recognised that the taxonomy on environmentally sustainable financial products is an effective way of channelling private investment towards sustainable activities⁷¹. The aims of the Taxonomy Regulation can be summarised as follows: on the one hand, it aims to promote sustainable investments, i.e. informed investment choices with a positive impact of on the environmental, social and governance spheres. On the other, the legislator has decided to protect the investor from the negative effects that sustainability risks may have on the return on the investment⁷². The Regulation in question is addressed to financial market participants, who are in this context the same as those who produce financial products⁷³. The environmental objectives are indicated pursuant to art. 9: climate change mitigation; adaptation to climate change; the sustainable use and protection of waters and marine resources; the transition towards a circular economy; prevention and reduction of pollution; the protection and restoration of biodiversity and ecosystems.

The original element of the regulation concerns the requirements for marketing financial products or corporate bonds as environmentally sustainable investments. The criteria are defined ex art. 3, where an economic activity is considered sustainable if it contributes substantially to the achievement of one or more environmental objectives referred to art. 9; if it does not cause significant harm to any of the objectives already mentioned; if it's carried out in compliance with the minimum guarantees⁷⁴;

⁷¹ Cons. 11, Regulation (EU) 2020/852.

⁷² R. ROLLI, *The impact of ESG factors on the company. Governance models and new responsibilities*, Il Mulino, Bologna, 2020.

⁷³ Pursuant to art. 2, par. 2, «financial market participant» means a financial market participant as defined in Art. 2(1) of Regulation (EU) 2019/2088, including the producer of a pension fund to which a Member State has decided to apply that Regulation in accordance with Article 16 thereof.

⁷⁴ The minimum guarantees are provided ex art. 18, UE Regulation 2020/852.

finally, it must comply with the technical screening criteria⁷⁵. According to eleventh *considerandum*, this action increases investor confidence and makes them aware of the environmental impacts of these financial products, also counteracting *greenwashing*. It has been found that financial markets not providing any explanation to investors discourage them from investing in eco-friendly financial products, penalizing the green equity market⁷⁶. In fact, the criteria for establishing whether an economic activity can be considered eco-sustainable are now harmonized at the Union level, with the aim of removing barriers to the functioning of the internal market as regards the collection of funds for green projects⁷⁷. Finally, now the investors can compare easier investment opportunities, while the issuers are incentivized to make their business more environmentally sustainable, otherwise investors will not choose their products⁷⁸.

6. European Green Bond Regulation

The European Commission followed the 2019 approach and deepened it as follow. It presented a proposal for a regulation on green bonds introducing a strict standard to which all issuers, both public and private, may voluntarily adhere⁷⁹. The European legislator has adopted the EU *Regulation 2023/2631*⁸⁰; it sets an optional gold standard singling out uniform requirements for issuers of bonds who wish to use the designation 'European Green Bond' or 'EuGB' addressed to investors who intend to invest in high quality green bonds⁸¹. Through this regulation, the European Union – aware of the inefficiency of the GBP guidelines issued by ICMA –

⁷⁵ The technical screening criteria are provided ex artt. 10, par. 3, art. 11, par. 3, art. 12, par. 2, art. 13, par. 2, art. 14, par. 2, art. 15, par. 2.

⁷⁶ Cons. 13, UE Regulation 2020/852.

⁷⁷ Cons. 12, UE Regulation 2020/852.

⁷⁸ See Cons. 12 and 13, UE Regulation 2020/852.

⁷⁹ F. CONTE, *op. cit.*

⁸⁰ Regulation (EU) 2023/2631, *on European Green Bonds and voluntary disclosures for environmentally sustainable bonds and sustainability-related bonds*, in Official Journal of the European Union, 22 November 2023, in https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=OJ:L_202302631, last access on date 05.15.2024.

⁸¹ S. GILOTTA, *The new EU regulation on green bonds: a rare (and virtuous) example of light-touch regulation by the European legislator*, in *Quaderni Assosim*, Vol. I, n. 1, 2023. Also see G. G. FEDI, *Sustainable Finance, EU Council and Parliament agree on green bonds*, in *Focus Risparmio*, 3 March 2023, available on <https://www.focusrisparmio.com/news/finanza-sostenibile-accordo-green-bond-europei>, last access on date 05.15.2024.

intends to counter attempts at *greenwashing*. Until now, an unclear definition of sustainable economic activities and a not uniform legislation throughout Europe allowed fundraising by issuers under the pretense of environmentally sustainable activities, playing on the fact that investors were not able to realize which bonds were truly eco-friendly. The European regulation represents a further step in the implementation of the Action Plan's strategy on sustainable growth and the transition to a neutral and resource-efficient economy in line with the Green Deal. The new European standard seems to favor the consistency and comparability of green bonds, to the benefit of both issuers and investors. The EuGB Regulation provides for several requirements related to three different areas: (a) the use of proceeds; (b) disclosure requirements; (c) external audit by an authorized third party and supervision⁸². This regulation has in the European Taxonomy its founding pillar⁸³, thereby introducing more stringent disclosures through the use of standardized templates and requiring external valuers to be registered and supervised by the European Securities Authority (ESMA).⁸⁴ The specific "EuGB" label is accessible to issuers that demonstrate their intention to finance environmental sustainability projects in line with the EU Taxonomy: the proceeds must be used in full to finance this type of economic activity⁸⁵.

However, there is room for flexibility in the use of proceeds under art. 5 of the aforementioned regulation, which stipulates that issuers may allocate up to fifteen percent of the proceeds of a European green bond to economic activities that meet the taxonomy criteria, with the exception of technical screening criteria⁸⁶.

⁸² E. ROBERTO AND A. CAPRARO, *The novelties of the Green Bond Regulation*, in *Rivista di Diritto Bancario*, 2024, in <https://www.dirittobancario.it/art/le-novita-del-regolamento-green-bond/#:~:text=Il%20Regolamento%20Green%20Bond%20si,nella%20sostenibilit%C3%A0%20dei%20loro%20investimenti>, last access on date 05.15.2024.

⁸³ Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088, 2020, in <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32020R0852>.

⁸⁴ The European Securities Authority (ESMA) is an independent body of the European Union whose goals are those of reinforcing investor protection and promoting stable and orderly financial markets.

⁸⁵ G. G. FEDI, *The Regulation on European Green Bonds debuts in the Official Journal*, on *Focus Risparmio*, 1 December 2023, <https://www.focusrisparmio.com/news/il-regolamento-sui-green-bond-europei-debutta-in-gazzetta-ufficiale>, last access on date 05.15.2024.

⁸⁶ Art. 4 Reg. (EU) 2023/2631 distinguishes between a single-issue approach, the so-called "gradual approach", and a "portfolio approach". The former refers to the process before the maturity of European Green Bond, where the proceeds of such a bond shall be allocated in

As far as transparency is concerned, a number of measures must be respected by those who want to adopt the EuGB label, including the disclosure of relevant information on how the proceeds of the bond will be used. Companies, for example, must prepare a strategy for the green transition of the company and demonstrate how these investments contribute to its realization⁸⁷. An information document will be published, the so-called *pre-issuance factsheet*⁸⁸, before the issuance of the bond in order to verify the consistency of the issue with the objective of environmental sustainability, i.e. the credibility of the issuer's environmental commitments⁸⁹. In addition, the issuer must provide the market with an annual report, the so-called *allocation report*⁹⁰, and afterwards has to provide a final report, the so-called *impact report*, which describes the impact, positive or negative, of the projects financed through the issuance⁹¹.

An innovation introduced by the European Green Bond Regulation is the registration system and the supervisory framework for the external auditors of European Green Bonds, i.e. those independent entities responsible for assessing compliance with the rules⁹². On the one hand, in order to avoid hypothetical conflicts of interest⁹³, external auditors must register with ESMA under a formal authorization procedure⁹⁴; on the other, issuers' compliance with audit and disclosure requirements is subject to the

full, in accordance with taxonomy requirements, to the categories defined by par. 1; the latter refers to derogation from par. 1, issuers may allocate proceeds from one or more outstanding European Green Bonds to a portfolio of fixed assets or financial assets in accordance with the taxonomy requirements. As to the technical screening criteria see *supra* p. 20.

⁸⁷ European Parliament Press Release, *Green bonds: new EU standard approved to combat greenwashing*, 05 October 2023, available on <https://www.europarl.europa.eu/news/it/press-room/20230929IPR06139/green-bond-approvato-nuovo-standard-ue-per-contrastare-il-greenwashing>.

⁸⁸ Art. 10, par. 1, Regulation (EU) 2023/2631.

⁸⁹ S. GILOTTA, *op. cit.*, p. 19.

⁹⁰ Art. 11, par. 4, Regulation (EU) 2023/2631.

⁹¹ S. GILOTTA, *op. cit.*, p. 19.

⁹² European Parliament press release, *Green bonds: new EU standard approved to combat greenwashing*, 05 October 2023, available on <https://www.europarl.europa.eu/news/it/press-room/20230929IPR06139/green-bond-approvato-nuovo-standard-ue-per-contrastare-il-greenwashing>.

⁹³ The auditor suffers from obvious conflict of interest issues because the auditee, i.e. the issuer, pays for the service, most likely generating an incentive to be more lenient with the audits.

⁹⁴ Art. 22, par. 1, Regulation (EU) 2023/2631.

scrutiny of public supervisors at a national level.⁹⁵ Since this new auditor discipline has mitigated the problem of *greenwashing*, investors will be more incentivized towards European green bonds. The originality of this mechanism lies in the fact that it cannot be replicated by private organizations because they do not have the power to claim public supervisory authorities, giving the European public standard a competitive advantage over its private competitors⁹⁶. Another innovative element brought by the European regulation lies in its light-touch approach: in fact, its totally optional character enables green bonds' issuers trading them on the European market the possibility of adopting the special "European Green Bond" label⁹⁷. This original approach could serve as a model of regulation in other areas of sustainable finance and confers the advantage of stimulating competition in the standards market, with the indirect effect of fostering the further development of the green bond market⁹⁸.

7. Conclusions

Many of the critical issues discussed so far deriving from the absence of a specific regulation of 'thematic' bonds can be managed through contract, and for specific green bonds it is now possible to refer to the European regulatory apparatus. In fact, thanks to the recent regulatory action of the European Union, a uniform definition of environmentally sustainable economic activity is now provided by art. 3 of Regulation (EU) 2020/852⁹⁹. Assumptions relating to the risks to end investors deriving from *greenwashing* action by the issuer of the sustainable bond were also examined. This is a very important element for sustainable finance because, on the one hand, it encourages economic operators to invest beyond national borders since it is now possible to compare different investment opportunities, and on the other, economic operators wishing to attract investments from other EU countries meet the same criteria. The brand new Green Bonds Regulation, together with the Taxonomy Regulation and the Disclosure Regulation, is a perfect complement to the regulatory efforts

⁹⁵ E. ROBERTO and A. CAPRARO, *op. cit.*, p. 9.

⁹⁶ The case of the Climate Bonds Initiative is emblematic. S. GILOTTA, *op. cit.*, p. 20.

⁹⁷ *Ibidem.*

⁹⁸ *Ibidem.*

⁹⁹ See *supra* p. 20

carried out so far with the ultimate aim of combating the phenomenon of *greenwashing*.

However, remain some unresolved issues. Some authors argue that the contractual regulations governing the issuance of green bonds are often constructed in such a way as to deprive clauses governing the allocation of proceeds of any binding value: they are vaguely formulated in order not to legally commit the issuing company to the actual financing of the green projects for which the bond was issued. The new regulation does not regulate the consequences of non-compliances by the issuer, leaving the discipline to the individual national legal systems, a perspective that deserves to be further explored.

Finally, the parties are free to regulate the consequences of such non-performance through contract, for example by introducing a penalty for failure to comply with the contractual obligations.



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The European Union green strategic autonomy: twinning two potentially conflicting objectives

ABSTRACT - The deterioration of the geopolitical scenario is calling into question the energy transition towards climate neutrality. The idea of a green strategic autonomy has been introduced to address this crisis by safeguarding the environmental objectives established in recent years. This study explores this emerging notion and questions its potential legal implications for the competences of European institutions. Considering acts and measures adopted in the aftermath of Russia's aggression against Ukraine, the idea of an extension of the scope of environmental competences is advanced. This is examined in the light of the holistic approach suggested by the notion of strategic autonomy, and its impact on environmental sectors is assessed in relation to the achievement of external objectives. The ability of the European institutions to increase their capacity to act, reducing the traditional "vertical" and "horizontal" fragmentation of the Union's legal system, is finally verified in relation to the implementation of so-called environmental governance regimes. The aim is to illustrate whether the implementation of environmental objectives through the prism of strategic autonomy is a mere formula of political synthesis that does not introduce significant legal developments or, conversely, represents a development of a common objective that strengthens the Union's capacity to act.

KEYWORDS - Strategic autonomy - Green Deal - EU Climate Law - Environmental competence - Environmental governance regime

ANTONIO DI MARCO*

The European Union green strategic autonomy: twinning two potentially conflicting objectives**

CONTENTS: 1. *Introduction: the need for synthesis and action* – 2. *Holistic approach: coordinating powers and strategic planning* – 3. *The external dimension of environmental action: widening the scope* – 4. *The dirigiste role of European authorities: environmental governance regimes* – 5. *Conclusions*

1. Introduction: the need for synthesis and action

The idea of a “green strategic autonomy” has been introduced into the institutional debate as an attempt to synergetically reconcile two different objectives of the European Union (EU): the Common Foreign and Security Policy (CFSP) objective of “strategic autonomy”, understood as the ability of the Union to act autonomously in strategically important policy areas¹, and the European Green Deal objective of making the European economy and society climate-neutral².

The need to reconcile these objectives and combine them in a coherent way has emerged in the light of their many potential and latent contradictions. Indeed, the process of acquiring strategic autonomy and that of the green transition present certain conceptual and practical tensions that the current economic and political context highlights: in times of crisis, when the availability and affordability of basic goods and needs are threatened, socio-economic needs tend to prevail over environmental ones, defining scenarios of so-called *polluting autonomy*; in turn, the need for external supply to support the green transition can define a state of *green dependency*³.

The tragic deterioration of the European and international scenario, with the resulting social and political tensions, clearly challenges the green

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¹ European Parliament Research Service (EPRS), *EU Strategic Autonomy 2013-2023: From Concept to Capacity* (8 July 2022) [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)733589](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733589).

² EPRS, *EU green strategic autonomy: The challenge of combining two objectives* (21 September 2023) [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2023\)747465](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)747465).

³ *Ibid.*, p. 7.

transition process⁴. The EU has been forced to rethink its approach to the geopolitics of energy security, diversifying its external partners and strengthening its commitment to the energy transition⁵.

In order to secure their climate neutrality commitments, the European institutions have provided some answers to the *autonomy / greening* “dilemma”, insisting on the circular economy, the so-called nature-based solutions and the overcoming of the use of the Gross domestic product (GDP) as the sole indicator of success.⁶ In the words of the European Commissioner for the Environment, «the green transition will free us from our dependence on energy and other resource imports. The circular economy more specifically will allow us to reduce our demand for primary resources, and use a lot less energy for our production and consumption»⁷.

However, the acquisition of strategic autonomy through a transition based on the circular economy seems to run up against the difficulties of implementing such an economic model⁸. In addition, the European Court of Auditors (ECA) has pointed out that, in the light of the measures already adopted and planned⁹, there are serious indications that the assumptions made in the forecast reports of the Commission and its Joint Research

⁴ In addition to the Commission’s recent decision to withdraw its proposal for a regulation on the use of pesticides in agriculture (the so-called Sur regulation) in the wake of farmers’ protests, could be mentioned, for example, the position of French President Macron, who, in the light of growing challenges to achieve both greening and strategic autonomy, called for a pause in European environmental legislation in order to increase industrial competitiveness. Similar positions have emerged strongly in other countries in recent years, such as Germany and the Netherlands (v. EPRS, *EU green strategic autonomy: The challenge of combining two objectives*, cit., p. 8).

⁵ A.C. GOLDTHAU, R. YOUNGS, *The EU Energy Crisis and a New Geopolitics of Climate Transition*, in *Journal of Common Market Studies*, 2023, pp. 115-124.

⁶ For an overview of the positions of the European institutions on the subject see, *ex multis*, European Commission (EC), Joint Research Centre (JRC), *Towards a fair and sustainable Europe 2050: Social and economic choices in sustainability transitions*, Publications Office of the EU, Luxembourg, 2023.

⁷ Virginijus Sinkevicius, European Commissioner for the Environment, *Circular economy – the high road to strategic autonomy*, 21 November 2022, <https://www.europeanfiles.eu/environment/circular-economy-the-high-road-to-strategic-autonomy>.

⁸ H. LEHMANN, C. HINSKE, *Impossibilities of the Circular Economy*, Taylor & Francis, New York, 2022; R. STRAND, Z. KOVACIC, T. VOLKER, *The Circular Economy in Europe: Critical Perspectives on Policies and Imaginaries*, Taylor & Francis, New York, 2020.

⁹ For an introductory overview of the measures adopted and planned to support the transition to a circular economy see: <https://www.consilium.europa.eu/it/policies/circular-economy/>.

Centre (JRC) will not materialise and that additional measures will necessarily have to be taken in order to achieve the environmental objectives¹⁰.

To the need for “synthesis” would be added a need for “action”, suggested by the need to ensure the Union’s strategic autonomy in line with the binding scope of European climate law. The application of the notion of strategic autonomy in environmental matters is therefore of clear economic and political interest, given its potential impact on the fate of the ambitious economic transition agreed upon by the Member States and the European institutions in recent years. At the same time, it raises interesting legal questions: to what extent can the emergence of the notion of strategic autonomy in the environmental sphere affect the “synthesis” and “action” capacities of the European institutions? Can the process of acquiring strategic autonomy coherently reconcile potentially conflicting objectives, while at the same time helping to recompose a fragmentation of competences that is “horizontal”, between the Union’s various policies, and “vertical”, in relations between European and national authorities?

These questions, on which this reflection will focus, have been prompted in part by the increased attention that strategic autonomy has received in the wake of Russia’s aggression against Ukraine. With regard to external relations, it has been argued that this notion can affect the free exercise of sovereignty and the complex articulation of competences established by the Treaties¹¹. The so-called Strategic Autonomy Doctrine (SAD) would not only have contributed to the consolidation of the Union as an autonomous global actor¹², but would also have initiated a process in which the prerogatives of the EU and the Member States for the protection of (supra)national security and sovereignty would tend to become structurally intertwined, resulting in a «hybridisation of both the

¹⁰ ECA, Special report 18/2023: EU climate and energy targets – 2020 targets achieved, but little indication that actions to reach the 2030 targets will be sufficient, <https://www.eca.europa.eu/en/publications?ref=SR-2023-18>.

¹¹ On this point, see, *ex multis*, the contributions in the special issue of the *European Foreign Affairs Review* (4/2023), devoted to the analysis of the notion of strategic autonomy from a legal point of view.

¹² E. RYON, *European Strategic Autonomy: Energy at the Heart of European Security?*, in *European View*, 2/2020, p. 238; C. BEAUCILLON, *Strategic Autonomy: A New Identity for the EU as a Global Actor*, in *European Papers-A Journal on Law and Integration*, 2/2023, pp. 417-428.

supranational competences and the legal instruments concerned»¹³. In a system characterised by a high degree of institutional and decision-making fragmentation, the process of acquiring strategic autonomy would first require a holistic approach (para. 2). Its impact on environmental sectors would have to be assessed in relation to the achievement of external objectives (para. 3) and the implementation of so-called environmental governance regimes (para. 4).

Such an interpretive operation should make it possible to ascertain, firstly, whether the conjugation of environmental objectives through the prism of strategic autonomy, which gave rise to the “green strategic autonomy” dyad, is a mere formula of political synthesis that does not introduce significant legal developments or, conversely, represents the development of a common objective that strengthens the Union’s capacity to act (para. 5).

2. Holistic approach: coordinating powers and strategic planning

The adoption of a holistic approach, capable of recomposing the fragmentation of the institutional framework in order to guarantee the capacity of the European institutions to act, seems to be the main (albeit general) consequence of the emergence of the notion of strategic autonomy. The promotion of such an idea would be motivated by the divergence of the objectives pursued by the Union’s various policies, which often overlap and make it necessary to integrate and harmonise the various economic, technological, environmental and security policies¹⁴.

It could be argued that the adoption of such a holistic approach, aimed at recomposing the fragmented institutional framework in order to ensure the capacity of the European institutions to act, implies a power of coordination and strategic planning.

Such an idea is suggested by the Strategic Compass for a stronger EU security and defence¹⁵, which is one of the most recent documents on the

¹³ F. CASOLARI, *Supranational Security and National Security in Light of the EU Strategic Autonomy Doctrine: The EU-Member States Security Nexus Revisited*, in *European Foreign Affairs Review*, 4/2023, pp. 323-340.

¹⁴ In this sense see, for example: A. STEINBACH, *The EU’s Turn to ‘Strategic Autonomy’: Leeway for Policy Action and Points of Conflict*, in *European Journal of International Law*, 4/2023, pp. 973–1006, in particular p. 1000.

¹⁵ Council of the EU, 21 March 2022, A Strategic Compass for Security and Defence, Bruxelles, <https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf>.

pursuit of the goal of strategic autonomy within the Union's policies. This document not only analytically outlines the strategic context of security and defence, identifying common threats and challenges, but also defines in detail the priorities, objectives and actions to be taken in order to strengthen the security and defence pillar.

The actions envisaged are not limited to the typical instruments of the Common Security and Defence Policy (CSDP), such as rapid reaction mechanisms in the event of a crisis, but include entirely new initiatives and actions falling under other policies, such as investment in technological and industrial capabilities. As a result, the Strategic Compass would be, as has been rightly argued, «a tool for coordinating sectoral actions and initiatives that need to be directed towards a common objective»¹⁶.

However, the exercise of such a strategic coordination power in environmental matters is a well-established practice. The general environmental action programmes (EAPs), adopted since 1973 on the basis of the current Article 192(3) of the Treaty on the Functioning of the EU (TFEU), are clearly instruments for the strategic coordination of sectoral actions and initiatives directed towards common objectives. The holistic approach of the EAPs is dictated by the "global" and cross-sectoral nature of environmental issues, which is summarised by the so-called principle of the interdependence of different environmental aspects resulting from human activities, in general, and from productive activities, in particular. Human activities have an impact on the environment which, given the complex and interdependent relationships between the various aspects of the environment (water, soil, air, etc.), tends to be transversal and generalised; consequently, an efficient and effective policy to combat the degradation of natural resources can only be pursued through constant coordination of interventions¹⁷.

The 8th EAP, for example, provides guidance for EU policy-making, building on the commitments of the European Green Deal strategies and

¹⁶ M.E. BARTOLONI, *La politica di sicurezza e di difesa comune dell'UE: verso un'"autonomia strategica" o "strategie in autonomia"?*, in *Le istituzioni del federalismo*, 1-2/2022, pp. 45-64, in particular p. 63.

¹⁷ On the principle of the interdependence of different environmental aspects, and on its impact on the adoption of a holistic approach in the formulation of EAPs, see, in addition to the main EU environmental law handbooks: P. DAUVERGNE, *Environmental Politics*, Edward Elgar, Cheltenham, 2013; S. BAZIADOLY, S. ROLAND, A. MONOD, *La politique européenne de l'environnement*, Bruylant, Bruxelles, 2014; A. ULIRMAK, *The Role of the Environment Action Programmes of the European Union in the Development of EU Environmental Policy*, in *European Journal of Sustainable Development and Research*, 1/2016, pp. 1-9.

initiatives, such as the EU Biodiversity Strategy 2030, the new Circular Economy Action Plan, the Sustainable Chemicals Strategy and the Zero Pollution Action Plan¹⁸. This EAP aims to achieve a transition to a well-being economy by developing a «more holistic approach to policymaking through, *inter alia*, the use of a summary dashboard that measures economic, social and environmental progress “beyond GDP”»¹⁹. It provides “strategic” guidelines that the European institutions and Member States should implement in the context of other policies, such as agriculture, transport, competition, energy, tourism, industry and trade²⁰.

It should also be noted that the capacity to coordinate environmental objectives is based on legal bases that are additional to, and even prior to, those that can theoretically be invoked to guarantee the Union’s “capacity to act autonomously”, such as the principle of the autonomy of the EU legal order or that of loyal cooperation²¹.

As the Court of Justice of the EU (CJEU) has held since the well-known case *Greece v Council*, «environmental protection requirements shall be a component of the Community’s other policies»²². Decisions and strategies formulated in environmental matters should be integrated into each EU policy as a *ratio legis* and needs to be balanced and satisfied; and this on the basis of the principle of environmental integration enshrined in Article 37 of the Charter of Fundamental Rights of the EU (CFREU) and Article 11 TFEU. This principle, which is a horizontal clause of the Treaties, would integrate each policy and activity objectives that go beyond those specifically laid down in each legal basis; in the light of these objectives, the various policies would converge towards balanced and, in this sense, coherent and coordinated solutions.

As is well known, the principle of a high level of protection and improvement of the quality of the environment, as set out in Article 3(3)

¹⁸ Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, recital 11.

¹⁹ *Ibid.*, recital 19.

²⁰ On the cross-sectoral effect of environmental objectives, in addition to the authors mentioned in note 17, see: L. KRÄMER, *Manuale di diritto comunitario dell’ambiente*, Giuffrè, Milano, 2002, p. 42; P. FOIS, *Il diritto ambientale nell’ordinamento dell’Unione europea*, in G. CORDINI, P. FOIS, S. MARCHISIO (dir.), *Diritto ambientale. Profili internazionali europei e comparati*, Giappichelli, Torino, 2017, p. 75.

²¹ C. RAPOPORT, *Setting Norms and Promoting a Rules-based International Legal Order: Enhancing Strategic Autonomy Through the Autonomy of the EU Order*, in *European Papers-A Journal on Law and Integration*, 2/2023, pp. 447-457.

²² CJEU, 29 March 1990, C-62/88 *Greece v Council*, point 20.

TEU, is «a guiding objective of EU law, [...] which [...] forms part of EU primary law and is to be regarded as an interpretative tool of secondary law»²³. The environment would have an autonomous legal value, with a systemic status that would require any common policy to be implemented through the prism of environmental objectives, thus allowing a holistic approach to the Union's various policies²⁴.

In the light of above, it could be assumed that the process of acquiring strategic autonomy would not have a significant impact on the Union's ability to implement environmental objectives. On the contrary, it could be argued that it is the coordination and planning capacity strengthened by the exercise of environmental competences that can contribute to the realisation of CFSP objectives. This would be suggested in part by the nature of the concept of "green strategic autonomy" developed in the field of external relations, which places environmental and CFSP objectives in a close and structural relationship; this idea would also be supported by the external dimension of the Union's environmental policy, which has been affected by the European and international crisis triggered by Russia's aggression against Ukraine.

3. The external dimension of environmental action: widening the scope

The close and structural relationship between environmental and CFSP objectives, which justifies the exercise of environmental competences in conjunction with those related to the external dimension of the Union, can be assumed in the light of Article 191 TFEU and Article 21 TEU. The latter, which is devoted to general provisions on the Union's external action, sets the objective of contributing to the development of «international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development». Article 191 TFEU, in turn, confers the competence to promote «measures at international level to deal with regional or worldwide environmental problems, and in particular

²³ Opinion of Advocate General Sharpston, 12 October 2017, C-664/15 *Protect Natur*, point 68.

²⁴ V. S. STETTER, *Maastricht, Amsterdam and Nice: the Environmental Lobby and Greening the Treaties*, in *European Energy and Environmental Law Review*, 1/2001, pp. 150-159; M. LEE, *The Environmental Implications of the Lisbon Treaty*, in *Environmental law review*, 1/2008, pp. 131-138; H. VEDDER, *The Treaty of Lisbon and European Environmental Law and Policy*, in *Journal of Environmental Law*, 2/2010, pp. 285-299.

combating climate change». On this basis, environmental protection has gradually become a priority in the EU's relations with other countries, also in view of its value-based and systemic nature, which some authors have defined as "constitutional" in the light of Article 3 TEU²⁵.

The Union's ability to position itself as a «key driver of environmental policy in Europe and beyond» and a «world leader in international environmental protection» has long been emphasized²⁶. At the same time, attention was paid to the interconnections between the exercise of internal competencies and external objectives²⁷. In particular, it was argued that the more the EU is able to establish strong standards internally, the better it can promote its values internationally and develop its ability to assert itself on the international stage as an autonomous global player²⁸.

The European Green Deal, which echoes the Union's global ambition enshrined in the Paris multilateral agreement on climate change, is clearly set in this perspective. By defining the main lines to be developed in the bilateral dialogue with partner countries, it introduces the possibility of setting up innovative cooperation mechanisms where necessary²⁹.

The European and international crisis triggered by Russia's aggression against Ukraine has added further motivation to this combination of environmental objectives and external projection of the Union. In the Versailles Declaration, which represents the moment when green objectives "met" those closely linked to the notion of strategic autonomy, the European Council interpreted the energy transition and the objectives set by the European Green Deal as instrumental to the achievement of the «European sovereignty» through the reduction of

²⁵ In this sense, in addition to the authors mentioned in the previous note, see: A. SIKORA, *Constitutionalisation of Environmental Protection in EU Law*, Europa Law Publishing, Zutphen, 2020; T. HAYWARD, *Constitutional Environmental Rights*, Oxford University Press, Oxford, 2005, pp. 129–130.

²⁶ M. JÄNICKE, H. JÖRGENS, *New Approaches to Environmental Governance*, in M. JÄNICKE, K. JACOB (eds.), *Environmental Governance in Global Perspective. New Approaches to Ecological and Political Modernisation*, Freie Universität Berlin publication, Berlin, 2006, p. 173.

²⁷ P. TOBIN, D. TORNEY, K. BIEDENKOPF, *EU Climate Leadership: Domestic and Global Dimensions*, in T. RAYNER ET AL., *Handbook on European Union Climate Change Policy and Politics*, Edward Elgar, Cheltenham, 2023, pp. 187-200.

²⁸ A. BRADFORD, *The Brussels Effect: How the European Union Rules the World*, Oxford Academic, Oxford, 2020; N. HELWIG, *EU Strategic Autonomy: A Reality Check for Europe's Global Agenda*, in *Finnish Institute of International Affairs, Working Paper 119*, 2020, p. 12.

²⁹ EC, *The European Green Deal*, COM(2019) 640 final, 11.12.2019, point 3 – The EU as a global leader -, pp. 22-25.

economic dependence on hostile countries and the diversification of economic partners at international level³⁰.

At the same time, recent legislative proposals, adopted or under negotiation, on eco-design requirements³¹, European green bonds³² and corporate due diligence for sustainability³³, partly present the setting of internal standards as an increasingly important tool for the pursuit of strategic autonomy, as strong internal standards can be used internationally to promote multilateral alignment in favour of European interests and values³⁴.

An evident exercise in the implementation of environmental objectives as a function of the strategic autonomy acquisition process is also the REPowerEU plan, which aims to rapidly reduce «our dependence on Russian fossil fuels by fast forwarding the clean transition and joining forces to achieve a more resilient energy system and a true Energy Union»³⁵. In addition to the explicit presentation of the green transition as a function of the acquisition of strategic autonomy and the realisation of CFSP objectives, the European institutions provide detailed indications on aspects of industrial and investment policy³⁶. These are clearly policies that are functional to the green transition and which have been only marginally covered by the policies presented to achieve environmental objectives³⁷.

As underlined in the previous discussion, the scope of EU environmental action is rather broad due to the “global” and cross-sectoral nature of environmental issues, involving structurally interrelated policies

³⁰ Informal meeting of the Heads of State or Government, Versailles Declaration, 10 and 11 March 2022.

³¹ Proposal for a Regulation of the European Parliament and the Council, 30 March 2022, establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC, COM/2022/142 final.

³² Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds.

³³ Proposal for a Directive of the European Parliament and the Council, 23 February 2022, on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

³⁴ In this sense see, for example, N. HELWIG, *EU Strategic Autonomy: A Reality Check for Europe's Global Agenda*, cit., p. 23.

³⁵ EC, REPowerEU Plan, COM(2022) 230 final, 18.5.2022.

³⁶ Ibid., p. 21.

³⁷ For an overview of the current status of the 20 legislative proposals that make up the package of policies presented to achieve the environmental goals, see the EP webpage (<https://www.europarl.europa.eu/legislative-train/package-fit-for-55>).

such as agriculture, transport, competition, energy, tourism, industry and trade³⁸. The application of the concept of strategic autonomy, by enriching environmental action with “new” motivations, would strengthen the cross-sectoral and transversal nature of environmental policy by developing references to policies that are functional for its implementation.

The introduction of the notion of strategic autonomy thus fits into a legal and action framework that has been well established over time, broadening the rationale and references to the policies needed to jointly achieve environmental and external objectives. From this perspective, the process of acquiring strategic autonomy, while not significantly affecting the powers of action in environmental matters, could potentially expand their scope.

This idea, in addition to the REPowerEU, would also be supported by the 2022 Strategic Foresight Report, entitled «twinning the green and digital transitions in the new geopolitical context»³⁹. In this document, in addition to the references to the areas traditionally covered by environmental action, the reference to investment policies is strengthened and some indications on education and training are introduced⁴⁰.

This approach, aimed at broadening the scope of environmental action, is even more pronounced in the 2023 Strategic Foresight Report, entitled «sustainability and people’s wellbeing at the heart of Europe’s Open Strategic Autonomy». In this document, the achievement of climate neutrality is linked to a strictly social dimension and to ten strategic policy areas, such as the «Europe of investments» or «making public budgets fit for sustainability»⁴¹.

Such a broadening of references to the policies necessary to achieve environmental objectives, with a view to promoting the so-called “Open Strategic Autonomy of the Union”, would suggest a markedly dirigiste role for European and national public authorities, which should be reflected in the context of the so-called European environmental governance regimes.

³⁸ On this point see the authors mentioned in the note 20.

³⁹ EC, 2022 Strategic Foresight Report Twinning the green and digital transitions in the new geopolitical context, COM(2022) 289 final, 29.6.2022.

⁴⁰ Ibid., pp. 14-19.

⁴¹ EC, 2023 Strategic Foresight Report Sustainability and people’s wellbeing at the heart of Europe’s Open Strategic Autonomy, COM(2023) 376 final, 6.7.2023, points 5-6.

4. *The dirigiste role of European authorities: environmental governance regimes*

The idea that the process of acquiring strategic autonomy implies a dirigiste role for public authorities, especially those of the Union, is broadly supported by the general adoption of a deliberately interventionist approach, with a strong top-down political dynamic, which emerged forcefully during the Covid-19 pandemic crisis⁴².

In recent years, marked by health and geopolitical crises, the Union would finally abandon its role as a mere “supranational regulator” with limited capacity to directly support climate-friendly investments.

The European Green Deal, for example, quickly evolved from a simple plan of action into a green recovery programme; indeed, it would be an important part of the Next Generation EU (NGEU)⁴³. At the same time, the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD) are positioning themselves as key players in providing economic support for the green transition⁴⁴.

By recognising that the acquisition of strategic autonomy in line with climate neutrality goals will require investments on an unprecedented scale, the Union would consolidate and intend to strengthen its ability to act “directly” and autonomously in strategically important policy areas⁴⁵. In this perspective, it would propose scenarios in which national governments would be induced to transfer competences and powers to the EU.

The Commission’s JRC report «*Towards a fair and sustainable Europe 2050: Social and economic choices in sustainability transitions*», which complements the Strategic Foresight 2023 report on the «*Europe’s Open Strategic Autonomy*», illustrates the rationale for enhanced EU leadership in a scenario defined as «*greening through crisis*», where the green transition is motivated by geopolitical instability and the impacts of climate change. Without a systemic approach, the scope of the green transition would be limited; only in combination with reductions in production and

⁴² S. BOGOJEVIĆ, *Covid-19, Climate Change Action and the Road to Green Recovery*, in *Journal of environmental law*, 3/2020, pp. 355-359.

⁴³ R. QUITZOW ET AL., *Green Recovery: Catalyst for an Enhanced EU Role in Climate and Energy Policy?*, in *Handbook on European Union Climate Change Policy and Politics*, cit., pp. 351–366.

⁴⁴ D. MERTENS, M. THIEMANN, *The European Investment Bank: the EU’s Climate Bank?*, in *Handbook on European Union Climate Change Policy and Politics*, cit., pp. 68-82.

⁴⁵ EC, *2023 Strategic Foresight Report Sustainability and people’s wellbeing at the heart of Europe’s Open Strategic Autonomy*, cit., pp. 5, 8-10.

consumption due to external events could the EU achieve climate neutrality⁴⁶.

Such a systemic approach, aimed at consolidating and strengthening the Union's capacity for action, should theoretically be reflected in the so-called European environmental governance regimes. As known, these regimes, based on planning and results obligations, allow the European authorities to assess the effectiveness of national measures and their conformity with European objectives, providing at the same time corrective indications useful for the definition of common policies in the medium and long term⁴⁷. In the more advanced systems, regulatory frameworks are focused on persistent environmental problems linked to structural characteristics of important sectors of the economy; and these environmental governance regimes are continuously developed through the so-called reflexive framework directives⁴⁸, which in turn lead to long-term regulatory objectives at EU level⁴⁹.

The most emblematic example of such regimes is the management of water resources, where the Water Framework Directive imposes obligations of results and organic planning. These obligations are complemented and constantly supplemented by obligations of means through the related “daughter directives”; these specific acts of EU hard law tend to block the regulatory and economic planning of public authorities, also in function of the green transition and the circular economy⁵⁰. However, in the perspective of ensuring a systemic approach, the so-called climate and energy governance regime, defined by the European climate

⁴⁶ EC, JRC report, *Towards a fair and sustainable Europe 2050: Social and economic choices in sustainability transitions*, cit., p. 29.

⁴⁷ L. KRÄMER, *Environmental Governance in the EU*, in M. ALBERTON, F. PALERMO (eds.), *Environmental Protection in Multi-Layered Systems*, Brill, Leiden, 2012, pp. 9-30; J. SCOTT, *Law and Environmental Governance in the EU*, in *International and comparative law quarterly*, 4/2002, pp. 996-1005.

⁴⁸ The environmental directives are defined as “reflexives” in that they support meaningful cross-national comparison and mutual learning, and they are themselves subject to regular review and revision. Generally, on the so-called reflexive governance, transversally adopted in the European integration process, see, *ex multis*, E. LANTSCHNER, *Reflexive Governance in EU Equality Law*, Oxford University press, Oxford, 2021.

⁴⁹ In these terms see J. SCOTT, *Environmental protection: European law and governance*, Oxford University press, Oxford, 2009, p. 23.

⁵⁰ On this point see A. DI MARCO, *Water Law in Circular Economy: Ultra Vires Actions in Environmental Sector, or when Union Ambition Far Exceed its Abilities*, in *Maastricht Journal of European and Comparative Law*, 2/2022, pp. 182-200.

law⁵¹ and the regulation on the Governance of the Energy Union and Climate Action⁵², is of particular importance. Indeed, it has definitively established the structural link between climate and energy issues, by reducing at the same time the fragmentation of the legal framework⁵³.

The climate and energy governance regime clearly provides the framework where the Union will have to measure its ambitions in terms of strategic autonomy and strengthening of capacity action. By focusing on the complex and multifaceted dialogue between the Commission and the Member States on integrated national energy and climate plans (NECPs), this governance regime offers the opportunity to adopt a systemic approach and strengthen the horizontal coherence of policies related to the energy transition⁵⁴.

The NECPs, which have to fulfil formal obligations and reflect the logic of the five dimensions of the so-called Energy Union, are monitored in the light of qualitative objectives, accompanied by results obligations, by analysing the reporting on investment needs and related sources of financing of policy measures⁵⁵. For each dimension, Member States must include targets, objectives and/or contributions, as well as policies and measures to achieve national objectives; the Commission, in turn, integrates references to hard law instruments, such as those related to energy efficiency and renewable energy, with traditional soft governance instruments, which also cover aspects of taxation and adjustment of public budgets, in its assessments⁵⁶.

⁵¹ 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').

⁵² Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

⁵³ M. KNODT, *Instruments and Modes of Governance in EU Climate and Energy Policy: from Energy Union to the European Green Deal*, in *Handbook on European Union Climate Change Policy and Politics*, cit., pp. 202-215.

⁵⁴ L. HANCHER, *EU Energy Governance—Moving Targets and Flexible Ambitions between Opacity and Opportunism?*, in *Yearbook of European Law*, 2022, pp. 162-196.

⁵⁵ ECA, Special report 18/2023: EU climate and energy targets – 2020 targets achieved, but little indication that actions to reach the 2030 targets will be sufficient, cit., Annex IV, pp. 56-58.

⁵⁶ S. SCHLACKE ET AL., *Implementing the EU Climate Law via the 'Fit for 55' package*, in *Oxford Open Energy*, 1/2022, pp. 1-13; M. KNODT, J. SCHOENEFELD, *Harder Soft Governance in European Climate and Energy Policy: Exploring a New Trend in Public Policy*, in *Journal of Environmental Policy and Planning*, 6/2020, p. 761.

The integration of soft law instruments into hard law instruments has led some authors to advance the idea of a «harder soft governance», where the rigid division of competences tends to blur and the European institutions increase their steering capacity far beyond the powers granted to them⁵⁷.

Supported also by the strengthening of the so-called “shame and blame” instruments⁵⁸, it could be argued that the process of acquiring strategic autonomy would consolidate the position of the European institutions in the constant dialogue with national authorities. By paraphrasing the current President of the CJEU, given the need to protect the process of integration and the autonomy of the Union, it would not be «possible to ascertain a nucleus of sovereignty that Member States can invoke, as such, against the Community»⁵⁹. In the light of the principle of loyal cooperation, going back to other interesting reflections on the Union’s competences, it would seem «superfluous, or at any rate merely an exercise in style, to try to draw a clear-cut boundary between the competences of the Union and the competences proper to the States, since the settling of the legal and institutional construction of the Union has affirmed a cooperation that is propitiated from above, but which feeds a constant dialogue aimed at creating a *humus* within which the different powers unfold»⁶⁰.

However, the ability of the European institutions to increase their capacity to act, reducing what we have referred to as the “vertical fragmentation” of the Union’s legal system, remains largely untested. Possible “dirigiste” developments in the Union would have to contend with two structural limitations of such a governance regime: first, the Commission’s recommendations on NECPs remain non-binding, and Member States simply have to «take due account of the recommendation in a spirit of solidarity between Member States and the Union and between Member State, [and indicate] in the year following the year the

⁵⁷ M. KNODT, M. RINGEL, R. MÜLLER, “Harder” Soft Governance in the European Energy Union, in *Journal of Environmental Policy and Planning*, 6/2020, p. 1; P. BOCQUILLON, E. BROOKS, T. MALTBY, *Speak Softly and Carry a Big Stick: Hardening Soft Governance in EU Energy and Health Policies*, in *Journal of Environmental Policy & Planning*, 6/2020, p. 843.

⁵⁸ M. KNODT, *Instruments and Modes of Governance in EU Climate and Energy Policy: from Energy Union to the European Green Deal*, in *Handbook on European Union Climate Change Policy and Politics*, cit., pp. 202-215.

⁵⁹ K. LENAERTS, *Constitutionalism and the Many Faces of Federalism*, in *American Journal of Comparative Law*, vol. 38, 1990, p. 220.

⁶⁰ P. DE PASQUALE, *Competenze proprie degli Stati e principio di leale collaborazione*, in AA.VV., *Temi e questioni di diritto dell’Unione europea*, Cacucci, Bari, 2019, p. 12.

recommendation was issued, how it has taken due account of the recommendation »⁶¹.

Second, national authorities retain a wide margin of discretion on the means to be adopted to meet the outcome commitments.⁶² The climate and energy governance regime does not precisely define the measures to be taken by the EU institutions and Member States, and when, to move towards a low-carbon Europe by 2050⁶³. In this context, the idea can be put forward that the Member States are bound by a general planning obligation which does not bind the regulatory and economic planning of the public authorities to specific measures. The Union's capacity to act would remain functional and subordinate to the decisions taken by the Member States, even if the measures identified received financial support from the Union.

It could be argued that the legal framework established to protect the environment and combat climate change would provide suitable instruments for coordination and strategic planning, but the Union's ambition to strengthen its capacity for autonomous action would be frustrated by uncertainty about the measures to be taken. The lack of a broad consensus on "how" to proceed would make green strategic autonomy an inescapable dyad whose operational uncertainties would exacerbate the limitations of a system that remains firmly anchored in the principle of attribution.

5. Conclusions

This article has shown that the introduction of the notion of strategic autonomy in the environmental field does not seem to have a significant impact on the "synthesis" and "action" capacities of the European institutions. On the contrary, it can be argued that it is the powers and capacities for action that have been consolidated in recent decades in the environmental field that can contribute to the pursuit of external objectives.

It has been noted that the powers of coordination and strategic planning, implicitly identified as the main potential consequence of the

⁶¹ Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, cit., art. 34(2).

⁶² S. ROMPPANEN, *Targets, Timetables and Effort Sharing as Governance Tools: Emergence, Scope and Ambition*, in *Handbook on European Union Climate Change Policy and Politics*, cit., pp. 216–230.

⁶³ L. HANCHER, *EU Energy Governance—Moving Targets and Flexible Ambitions between Opacity and Opportunism?*, cit., p. 171.

process of acquiring strategic autonomy, are a well-established feature of joint action in environmental matters. Indeed, the so-called principle of the interdependence of different environmental aspects, which reflects the cross-sectoral nature of environmental issues, has motivated since the 1970s the adoption of strategic documents aimed at coordinating sectoral actions and initiatives that need to be oriented towards a common objective.

Furthermore, it has been argued that the environmental policies and strategies formulated should be integrated into all EU policies as a *ratio legis*, by virtue of the principle of environmental integration enshrined in the Treaties and the CFREU. The latter, as is well known, is, according to established case law, a guiding objective of EU law that establishes a link between the general integration objectives set out in the introductory articles of the TEU and the specific tasks and powers conferred on the EU in the subsequent titles of the TFEU. This principle, which would act as a horizontal clause in the Treaties, would integrate into each policy and activity objectives that go beyond those specifically set out in each legal basis, thus allowing for a holistic approach to the Union's various policies.

In this perspective, it seems clear that in the legal framework of the Union, where the environment has acquired an autonomous systemic legal status, which is regarded by some authors as “constitutional”, the process of acquiring strategic autonomy will necessarily have to be interpreted and implemented through the prism of environmental objectives, particularly in the light of those recently enshrined in European climate law.

Green strategic autonomy would represent a dyad in which the two constituent elements, strategic autonomy and green transition, are interrelated and must be considered together in the formulation of policies and decisions. In the event of conflicts between these two elements, a reasonable attempt should be made to reconcile them, in line with the case law of the CJUE on the application of the principle of environmental integration, which, as is well known, does not require that environmental protection needs be systematically prioritised⁶⁴.

However, within the framework of an assessment of measures and actions that are essentially justified on the basis of strategic autonomy and that pose the dilemma “polluting autonomy”/“green dependence”, it can be assumed that a *primauté* should be guaranteed to the green transition. In particular, in situations where the external goal of strategic autonomy cannot be pursued through a well-balanced implementation, and where the

⁶⁴ On this point see, *ex multis*, the Opinion of Advocate General Bot, 8 May 2013, C-204/12 a C-208/12 *Essent Belgium NV*, point 92.

contested action irretrievably undermines the detailed objectives set by European climate law, a “tragic choice” should be made in favour of the “green dependency” scenario. This is in the light of the legal status of environmental objectives, which today seem particularly emphasized by the current dramatic ecological crisis, and the ethical imperative of intergenerational justice, which the EU and its Member States have solemnly recognised on several occasions, both internally and through their adherence to international agreements such as the multilateral Paris Agreement on climate change⁶⁵.

However, the EU’s ability to resolve such “dilemmas” in a coherent manner, striking the right balance between strategic autonomy and accelerating the green transition, appears to be compromised, or severely limited, by the difficulty of assessing the impact and possible (and uncertain) scenarios associated with specific decisions, as suggested in part by some NGOs through a complaint submitted to the European Ombudsman on 25 May 2022⁶⁶. This complaint questioned an agreement with the United States on European energy security, concluded under REPowerEU on 25 March 2022, which, according to the appellants, was fundamentally based on an incorrect assessment of the impact on climate neutrality objectives of the proposed measures to reduce dependence on energy imports from Russia and would commit the Union to a long-term dependence on fossil fuels⁶⁷.

In the light of this difficulty, the ability of the Green Deal to guarantee the acquisition of strategic autonomy in a consistent manner has been questioned;⁶⁸ and the application of the proportionality test in a hypothetical balancing act would revive old criticisms of this method, described by its detractors as a «fluid and virtually uncontrollable

⁶⁵ On the EU’s recognition of the ethical imperative of intergenerational justice, in addition to the authors mentioned in the notes 24-26, see also: A. BUSER, *Towards a Climate Resilient European Union? Prospects and Limitations of a General EU Climate Adaption Law*, in *Journal for European Environmental & Planning Law*, 2/2023, pp. 127-144.

⁶⁶ Global Legal Action Network et al., *Complaint to the European Ombudsman on Oil and Gas Imports from Russia*, 25 Maggio 2022, <http://climatecasechart.com/non-us-case/complaint-to-the-european-ombudsman-on-oil-and-gas-imports-from-russia/>.

⁶⁷ *Ibid.*, para. 8-9.

⁶⁸ O. QUIRICO, *The European Green Deal: a Gateway to Strategic Energy Autonomy?*, in *Cuadernos Europeos de Deusto*, 2023, pp. 69-87.

procedure»⁶⁹, «marasmus and methodological misery»⁷⁰ or «an unprincipled technique»⁷¹.

Uncertainty about the measures is partly evident in the recent energy and climate governance regime. It has been pointed out that the current legal framework for the protection of the environment and the fight against climate change, defined by the European Climate law and the regulation on the Governance of the Energy Union and Climate Action, has definitively established the structural link between climate and energy issues. The so-called horizontal fragmentation of the Union's legal system has been significantly reduced, but the measures to be taken by the Union's institutions and Member States and the timeframe for moving towards a climate-neutral Europe by 2050 are not precisely defined. This would reflect a lack of broad consensus on "how" to proceed, which in turn would undermine the Commission's ability to coherently reassemble what we have called "vertical fragmentation".

In this context, the previous discussion has therefore put forward the idea that the Member States are bound by a general planning obligation, which does not bind the regulatory and economic planning of the public authorities to specific measures. The Union's capacity to act would remain functional and subordinate to the decisions taken by the Member States, even if the measures identified received financial support from the Union.

However, it could be argued that the broadening of the justifications and references to the policies needed to achieve environmental and external objectives together, contained in the documents adopted for the acquisition of strategic autonomy, could partly fill this gap and help to build the consensus needed to define the additional measures needed to achieve the environmental objectives evoked by the ECA.

The need to protect the integration process and the autonomy of the Union would strengthen the position of the European institutions in the complex and ongoing dialogue with national authorities "aimed at creating a *humus* in which different powers are deployed". The Commission could (or should) come up with proposals for additional measures, possibly in the form of obligations of means, also on the basis of the Union's emerging

⁶⁹ F. MÜLLER, O. JOUANJAN, *Discours de la méthode juridique*, Presses universitaires de France, Paris, 1996, pp. 205-206 e 287.

⁷⁰ C.-A. MORAND, *Vers une méthodologie de la pesée des valeurs constitutionnelles*, in *Etudes en l'honneur de Jean-François Aubert*, Helbing & Lichtenhahn, Bâle/Francfort-sur-le-Main, 1996, pp. 59 ss.

⁷¹ A. ALEINIKOFF, *Constitutional Law in the Age of Balancing*, in *Yale Law Journal*, 1987, pp. 943-1005.

interventionist and dirigiste role, which is significantly increasing its capacity to directly support climate-friendly investments.

In the context of a transition that sets itself the ambitious goal of changing the economic paradigms that have partly animated the integration process, it is legitimate to consider the hypothesis of the introduction of obligations of means that complement those of planning and concretely support those of results, as was done in the water governance regime, for example. As is well known, in such a regime, the margin of manoeuvre of the States has been considerably reduced by the definition of obligations of means; it has *de facto* required an intervention capable of guaranteeing the establishment of an investment plan, thus “blocking” the regulatory and economic planning of the national public authorities⁷². In this perspective, the work of the European Scientific Advisory Board on Climate Change, which, according to the European climate legislation, has the task of «identifying actions and opportunities needed to successfully achieve the Union climate targets», could be relevant⁷³.

The European institutions and the Member States would have to confront each other on these scenarios, which imply a limitation of the Member States’ margin of manoeuvre and a consolidation of the Union’s capacity to act, given the binding nature of the environmental objectives set by European climate law. As the previous discussion has shown, the conjugation of environmental objectives through the prism of strategic autonomy would not be a mere formula of political synthesis, but the logical and legal consequence of the systemic role that the environment has long occupied in the EU legal system.

However, the geopolitical and social uncertainties that challenge the various European governments weigh heavily on the consequences that the emergence of strategic autonomy may have on the Union’s capacity to act. It will probably be the task of the Commission that will be formed after the 2024 European elections to follow up the signs of qualitative change that the new geopolitical framework has unleashed.

⁷² A. DI MARCO, *Il diritto dell’acqua. Principi internazionali e regolamentazione europea*, Ed. scientifica, Napoli, 2018, p. 192.

⁷³ Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality (‘European Climate Law’), cit., art. 3.