The European Union and its rule-creating force on the European continent for moving to climate neutrality by 2050 at the latest

4. The European Union and its rule-creating force on the European continent for moving to climate neutrality by 2050 at the latest

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INTRODUCTION

Since the very first steps of global climate governance, the European Union has taken responsibility for addressing climate change.[1] It did so particularly by means of taking an active role as a party to international treaties in the field of climate change, and by adopting a broad package of internal EU laws, even if the interplay between internal and external action was often the sort of 'je t'aime, moi non plus' relation.[2] Stimulating sufficient ambition across the world was closely related to the need to overcome an awkward internal disagreement, as discussed by Kati Kulovesi, on how to steer the Union towards effective mitigation of its own emissions.[3] Altogether, developing internal frameworks and exerting influence through bilateral or regional cooperation[4] contributed to efforts to push the international agenda forward.[5]

In its internal order, the EU has built strong steering powers to address climate change by means of legal instruments, and has done so within the context of its fundamental values such

[1] In a 1989 resolution of the Council the need for the (then) European Economic Community and the Member States to play their full part in the definition and implementation of a global response to the problem, and this without delay, was already asserted: Council resolution of 21 June 1989 on the greenhouse effect and the Community OJ C 183, 20/07/1989 P. 0004–0005.

[2] An expression evoking a paradoxical love-hate relationship.

[3] Kati Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (Or I Might Force You To)', in Elisa Morgera (ed.), *The External Environmental Policy of the European Union* (Cambridge University Press 2012), 115; Marc Pallemaerts, 'Le cadre international et européen des politiques de lutte contre les changements climatiques' (2004) 33 (nº 1858–1859) *Courrier hebdomadaire du CRISP* 5–61, DOI 10.3917/cris.1858.0005, Chapter 5 on the EU policy on climate change (in French), evoking all early steps of the EU policy on climate change since 1989. The EU played, for instance, a decisive role in the adoption of the Kyoto Protocol, with the consequence that Member States had thereafter little other choice than to adopt legislation meant to comply with the new international duties.

[4] See also in this respect the discussion of so-called 'minilateralism': Kati Kulovesi, 'Addressing Sectoral Emissions outside the UNFCCC: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) 21 *Review of European, Comparative & International Environmental Law* (*RECIEL*), 193; Scott Barrett, *Why Cooperate? The Incentives to Supply Global Public Goods* (Oxford University Press 2007).

[5] Elisa Morgera and Kati Kulovesi, 'The Role of the EU in Promoting International Standards in the Area of Climate Change', University of Edinburgh School of Law Research Paper No. 2013/22, p. 15, also in Poli et al. (eds), *EU Governance of Global Emergencies* (Brill 2013). The following authors also use the concept of minilateralism; Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law*, 469; Tom Delreux and Sander Happaerts, *Environmental Policy and Politics in the European Union* (Palgrave 2016), 205–230.

as democracy and, particularly, the *rule of law*.[6] Indeed, in this specific international construct in which 27 states participate, law is a key driving force, which can be illustrated by the fact that EU law has primacy over the laws of the Member States,[7] and that the EU judicial system specifically intends to ensure consistency and uniformity in the interpretation of EU law.[8]

With respect to addressing climate change, the European Union legislator is entrusted with a competence to adopt legally binding regimes in the field of the environment and energy.[9] Such EU legislation applies to the territory of all Member States and impacts actors even beyond. Consequently, the European Union is without doubt a (potentially) powerful rule creator with respect to addressing climate change on the European continent.

In order to understand the law-making force of the European Union in the field of climate change, this chapter focuses on newly established key elements of EU climate legislation, as developed in the context of implementing the Paris Agreement. The legislative developments are, particularly since 2018, impressive in terms of number and complexity.[10] Moreover, with the Green Deal,[11] the European Commission, as in office since 1 December 2019, is determined to accelerate further rule creation in order to translate political promises into practice. The following statement made by Mrs Ursula von der Leyen (now President of the Commission), before the European Parliament in 2019 illustrates the high ambition: 'I want Europe to become the first climate-neutral continent in the world by 2050.'[12]

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[6] As codified in the Treaty on European Union (TEU), Article 2. The extent to which EU institutions respect the rule of law in practice (including the way in which this principle is interpreted) is one of the fundamental questions of EU law research.

[7] Nonetheless, see the debate on national courts retaining ultimate authority with regard to legal interpretation and application of EU law in Richard Avinesh Wagenländer, 'An Order of Deferential Monism: Why the Bundesverfassungsgericht's PSPP Ruling Merely Restates the Limits of the EU Legal System', European Law Blog 6 January 2021.

[8] Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174. The Court of Justice of the European Union (CJEU) has the power to decide on the legality of EU acts and has the power to impose financial penalties on Member States after an action started by the European Commission.

[9] As far as the competence of the EU reaches: the EU does not have full authority on all state matters but EU competence is based on the principle of conferral, and the use of competences is governed by the principles of subsidiarity and proportionality; see Article 5 TEU discussed by Robert Schütze, 'EU Competences. Existence and Exercise', in Anthony Arnull and Damian Chalmers, *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 75ff. See, on the EU environmental competence(s), including its relationship with energy competence and the limits provided by the treaties, but also the quite pro-EU interpretation by the CJEU, Helle Tegner Anker, 'Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities', in Marjan Peeters and Mariolina Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) Chapter 2.

[10] See for an account: Marjan Peeters, 'EU Climate Law: Largely Uncharted Legal Territory' (2019) 9 *Climate Law* 137–147.

[11] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal, COM(2019) 640 final.

[12] Ursula von der Leyen, (in her position as) Candidate for President of the European Commission Opening Statement in the European Parliament Plenary Session, Strasbourg 16 July 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_19_4230; see also 'A Union that strives for more. My agenda for Europe, Political Guidelines for the Next European Commission 2019–2024', https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf; see also on YouTube https://www.youtube.com/watch?v=8UrMwYDa_yU 22 January 2020, containing

However, from a geographical perspective, the EU consists of only 27 Member States while the European continent consists of more than 47 countries.[13] Nonetheless, the EU can exert important influence on other countries in Europe and even beyond in the sense of stimulating them to adopt rules addressing climate change that are aligned to – or even connected to – the EU climate law package. The fact that Switzerland has decided to link to the EU Emissions Trading System (EU ETS), is illustrative of that concrete influence,[14] as is the fact that Norway, Iceland and Liechtenstein – not being members of the EU – have also taken part in the EU ETS since 2008.[15] Furthermore, in respect of other EU climate regulatory action, cooperation also takes place with Norway and Iceland: both countries have agreed to apply two important EU climate laws, being the Effort Sharing Regulation[16] and the Land Use, Land Use Change, and Forestry Regulation[17] (LULUCF).[18] Even more regulatory influence can be exerted by the EU on other countries in Europe; for example, the EU expects candidate countries, with which negotiations are taking place for accession to the EU, to implement the EU

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the statement 'Europe will be the world's first climate-neutral continent by 2050' (all media accessed 2 August 2020).

[13] For instance, the Council of Europe has 47 parties, but even more countries exist in Europe, such as Kosovo, which declared independence in 2008. See for the map of parties to the Council of Europe https://www.coe.int/en/web/portal/47-members-states (accessed 2 August 2020). More accurate is the following expression in the context of the Green Deal Investment Plan: 'The European Union is committed to becoming the first climate-neutral bloc in the world by 2050.' https://ec.europa.eu/regional_policy/en/newsroom/news/2020/01/14-01-2020-financing-the-green-transition-the-european-green-deal-investment-plan-and-just-transition-mechanism (accessed 2 August 2020).

[14] According to information provided by the European Commission, this linking basically entails a 'mutual recognition of EU and Swiss emission allowances when surrendering allowances to cover emissions', see https://ec.europa.eu/clima/policies/ets/markets_en (accessed 2 August 2020). To take effect, further decision-making is needed. The regulatory design and consequences of such linking, including the rate of compliance with imposed obligations, need to be further studied. See on linking, for instance, Andreas Tuerk and Andrj F. Gubina, 'Linking Emission Trading Schemes: Concepts, Experiences and Outlook', in Stefan E. Weishaar (ed.), *Research Handbook on Emissions Trading* (Edward Elgar Publishing 2016) 309–326.

[15] These countries are party to the European Economic Area and the European Free Trade Association; see the official website: https://www.efta.int/eea (accessed 23 August 2020). The European Economic Area (EEA) compromises the EU Member States and the three EEA EFTA States (Iceland, Liechtenstein and Norway) in an Internal Market, with, in principle, the same package of rules. See, in respect of these three states' participation in the EU ETS since 2008: https://www.efta.int/EEA/news/Revised-ETS-Package-incorporated-EEA-Agreement-909 (accessed 23 August 2020).

[16] Regulation 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No. 525/2013 [2018] OJ L156/26.

[17] Regulation 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land-use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No. 525/2013 and Decision No. 529/2013/EU [2018] OJ L156/1 (LULUCF Regulation).

[18] European Commission, 'The European Union, Iceland and Norway Agree to Deepen their Cooperation in Climate Action' (25 October 2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6160: this document states that Iceland and Norway commit to binding annual greenhouse gas emission targets for the period 2021–2030 for those sectors of the economy that fall outside the scope of the EU Emissions Trading System, and that with regard to LULUCF same obligations and accounting rules will apply as in EU Member States.

acquis at the time of accession;[19] or within the European Neighbourhood Policy, governing the EU's relations with 16 of the EU's closest eastern and southern neighbours.[20] While this illustrates the (potential) large influence the EU has within the European continent, the EU has faced a dramatic moment in its history with the withdrawal of the United Kingdom from being a Member State on 31 December 2019, including the fact that the UK has left two core climate change instruments of the EU, being the EU Emissions Trading Scheme and the Effort Sharing approach. Nonetheless, the principle of 'non-regression',[21] which also covers carbon pricing, that has been agreed on between the EU and the UK, serves as a starting point for comparing development in the EU and the UK, although the comparison of potentially different regulatory approaches, including those that would not have fixed emission limits such as a cap or that allow fluctuating prices, can pose methodological challenges.[22] Even though the EU has less geographical scope after Brexit, with only 27 Member States, its rule-creating efforts (including its success and shortcomings) can still be examined as a benchmark for other countries on the European continent, and perhaps also for other countries and regions in the world.

The purpose of this chapter is not to give a thorough understanding of EU climate legislation as it has developed over the years: one single chapter does not provide enough space for such a discussion. Instead, it focuses on selected new topics of EU climate law that seem of core relevance for the future effectiveness of EU climate action. In light of this, section 2 focuses on the new concept of 'climate neutrality' and its proposed codification in EU law, as a means to implement the Paris Agreement. Section 3 delves into the internal competence (and limited powers) for EU climate legislation and some legislative instruments, with special attention paid to legislation aiming to streamline investment in sustainable activities. Section 4 discusses the emergence of climate litigation in light of the relatively ambitious package of EU climate legislation. The chapter will be rounded off with a look into the future of the regulatory approach of the European Union in the field of climate change: until now, hard law has set the foundation for effectuating the decrease of emissions, but new regulatory approaches have been established, the effectiveness of which has yet to be proven. The potential role of national climate litigation is also emphasised.

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[19] See for further information provided by the European Commission, also on potential candidate countries: https://ec.europa.eu/environment/enlarg/candidates.htm.

[20] To the South: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria and Tunisia; and to the East: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

[21] As codified in Article 7.2(2): 'A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection', and Article 7.3(5): 'Each Party shall maintain their system of carbon pricing insofar as it is an effective tool for each Party in the fight against climate change and shall in any event uphold the level of protection provided for by Article 7.2 [Non-regression from levels of protection]', Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OL L444/14, 31.12. 2020.

[22] See the principle of non-regression in the explanation mentioned in the previous note. The note also points to a possible linking of a new UK ETS with the EU ETS.

1 ACHIEVING CLIMATE NEUTRALITY IN 2050 IN THE EU IN VIEW OF THE PARIS AGREEMENT

1.1 The EU's Role with Regard to International Approaches Addressing Climate Change

In the TFEU, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change, is affirmed as of one the main goals of European policy on the environment.[23] Meanwhile, the EU is a party to all main treaties on climate change, including the Paris Agreement.[24] Member States are also parties to the Paris Agreement, with arrangements being made with the European Union on issues such as leading the negotiations or submitting the nationally determined contributions (NDC).[25]

While being a party to multilateral climate agreements such as the Paris Agreement, the EU has also tried to achieve climate action by a more stringent unilateral regulatory approach. This happened particularly when the international community did not respond, such as with regard to regulating aviation emissions, on which there was no effective international action in the first decade of this century. In view of this international regulatory gap, the EU legislator decided to stop waiting and to include international flights arriving and departing from EU territory in its EU ETS, which action was found lawful by the Court of Justice of the EU (CJEU).[26] Nonetheless, given international resistance to this unilateral pressure, this regulatory approach has been watered down by excluding the applicability of the EU ETS from flights to and from countries not covered by this instrument.[27] It is an example of, on the one hand, the willingness of the EU to regulate greenhouse gas emissions more effectively, and, on the

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[23] Article 191, §1, TFEU. This external action is the logical consequence of an internal competence to regulate the reduction of greenhouse gases. See Kulovesi (n. 3), 115.

[24] The EU is, together with its Member States, a party to the UNFCCC, the Kyoto Protocol, the Doha Amendment and the Paris Agreement. Of course, the EU can only act as far as its competences allow. For instance, the declaration of the EU to the Paris Agreement states that 'the commitment contained in its intended nationally determined contribution submitted on 6 March 2015 will be fulfilled through joint action by the Union and its Member States within the respective competence of each'; see https://unfccc.int/files/focus/ndc_registry/application/pdf/xxvii-7d_european_union_ndc.pdf (accessed 2 August 2020). This notion of joint action is maintained in the updated NDC of December 2020.

[25] Delreux and Happaerts (n. 5), 205–253.

[26] CJEU, Case C-366/10, *The Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v The Secretary of State for Energy and Climate Change* [2011] OJ C260/9 ('Case C-366/10'), Reference for a Preliminary Ruling from High Court of Justice Queen's Bench Division (Administrative Court) (United Kingdom) made on 22 July 2010. Kati Kulovesi, 'Make Your Own Special Song even if Nobody Else Sings Along: International Aviation Emissions and the EU Emissions Trading Scheme' (2011) 2 *Climate Law* 535; Hans Vedder, 'Diplomacy by Directive: An Analysis of the International Context of the Emissions Trading Directive' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders – Policy Interconnections between the EU and the Rest of the World* (Hart 2011); Morgera and Kulovesi (n. 5), 16.

[27] Re-inclusion of international flights is still under consideration: in the Commission Communication, 'Stepping up Europe's 2030 climate ambition' (COM(2020) 562 final of 17 September 2020) it is stated: 'International cooperation on … aviation is desirable' but should also be effective (p. 16). In light of this, the Commission puts forward 'the ambition to include international emissions from aviation … into the EU ETS'. In this sense, the original situation where external flights were included, would, somehow, revive.

other hand, the (political) difficulty of taking unilateral action on the global problem of climate change when the multilateral approach falls short.

With regard to the implementation of the Paris Agreement concluded on the European continent, the EU tries to take a lead, as it did before, in respect of the powers it retains according to the Treaties.[28] This must be understood in the light of the Paris Agreement, together with the content of the latest reports of the Intergovernmental Panel on Climate Change (IPCC) showing how seriously and urgently an additional policy answer is needed.[29] The Paris Agreement relies on the proactive and progressive actions parties will adopt individually, a specificity that can be further strengthened if subjected to a high degree of public pressure.

While the European Council (providing political guidance to the European Union but not having regulatory power) concluded in 2014 – so *before* the Paris Agreement – that the EU should achieve a reduction of at least 40% in greenhouse gas emissions by 2030,[30] new collective global goals as asserted in Paris require further commitments from the European Union. After new political guidance from the European Council for a more ambitious target, an updated nationally determined contribution was submitted in December 2020, with the pledge that the EU and its Member States, acting jointly, are committed to a binding target of a net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990.[31]

This EU pledge is part of a wider process across the EU continent. For example, Norway (not an EU member) had already submitted – before the EU did – an updated nationally determined contribution with a target of *at least 50% reduction* by 2030, thereby pointing towards cooperation with the EU for the increased ambition.[32] In that sense, it is interesting to see that a third country officially puts forward, at *the time of submission*, a higher ambition (50%)

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[28] See, regarding internal competence for climate action, section 3.1 below.

[29] See IPCC, 'Summary for Policymakers' in V. Masson-Delmotte et al. (eds), *Global Warming of 1.5 °C. An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (World Meteorological Organization 2018); IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2015).

[30] Conclusions of the European Council of 23–24 October 2014. Additionally, the EU has adopted measures with regard to renewable energy and energy efficiency. It is expected that 'the agreement by the European Parliament and the Council to raise the targets for renewables and energy efficiency to 32% and 32.5% respectively by 2030 … will result in GHG emission reductions of over 45% by 2030', see European Parliament, Resolution on the 2018 UN Climate Change Conference in Katowice, Poland (COP24), 25 October 2018, 2018/2598(RSP), available at https://oeil.secure.europarl.europa.eu/oeil/popups/printficheglobal.pdf?id=690200&l=en.

[31] UNFCC, NDC registry, available at https://www4.unfccc.int/sites/ndcstaging/Pages/Party.aspx?party=EUU&prototype=1 (consulted on 31 December 2020). The European Council endorsed this target in its meeting from 10–11 December 2020, see https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf.

[32] Update of Norway's nationally determined contribution (undated document – the website of the UNFCCC mentions 7 February 2020):

> By this submission, Norway updates and enhances its nationally determined contribution under the Paris Agreement to reduce emissions by at least 50 per cent and towards 55 per cent compared to 1990 levels by 2030. Norway seeks to fulfil the enhanced ambition through the climate cooperation with the European Union. In the event that Norway's enhanced nationally determined contribution goes beyond the target set in the updated nationally determined contribution of the European Union, Norway intends to use voluntary cooperation under Article 6 of the Paris

compared to the EU (40%), thereby, however, pointing at necessary cooperation with the EU (and in view of the yet to be further elaborated Article 6 of the Paris Agreement[33]) to achieve the increased ambition. Furthermore, the United Kingdom has pledged an even more ambitious reduction target compared to the NDC from the EU and its Member States, by means of an economy-wide net greenhouse gas emission target of at least 68% reduction in the UK by 2030.[34] Such a difference between the EU NDC and the UK NDC needs further consideration, in view of the requirements of the Paris Agreement too. While generally at EU level, it is not required to pursue the highest possible environmental ambition, the Paris Agreement specifically asks parties to reflect 'its highest possible ambition' in their nationally determined contribution.[35] How this international obligation has to be interpreted by a regional organisation such as the EU – allowing more stringent action by its Member States as stipulated in Article 193 TFEU for environmental measures, but submitting a joint declaration – needs further consideration and may be included in litigation strategies.

The international context also consists of important developments in the area of trade and investment guarantees. For the first time indeed, with the Trade and Cooperation Agreement published on 31 December 2020 between the EU and the UK, the fight against climate change ranks among the essential horizontal elements for which a serious and substantial failure can lead to the termination or suspension of the Agreement.[36] On the appreciation of what 'serious and substantial' might mean, the Agreement mentions that 'for greater certainty', an act or omission which materially defeats the object and purpose of the Paris Agreement shall always be considered a serious and substantial failure.[37] On the other hand, the EU's internal climate-related actions – such as legislative restrictions on the use of palm oil as biofuel

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Agreement to fulfil the part that goes beyond what is fulfilled through the climate cooperation with the European Union. Consent of the Parliament will be required.

See https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Norway%20First/Norway_updated NDC_2020%20(Updated%20submission).pdf (accessed 2 August 2020).

[33] Article 6 of the Paris Agreement provides some flexibilities for achieving national commitments by means of cooperation with other parties, see for instance its first paragraph: 'Parties recognize that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity.' The parties to the Paris Agreement have authority (and shall) adopt rules and other provisions for such cooperation, see Art. 6(7) with Art. 6(4) Paris Agreement. Negotiations on that Article were at the core of recent COP24 (Katowice) and COP25 (Madrid) but could not reach an agreement. Article 6 is on the agenda of COP26, delayed to 2021 due to the COVID-19 crisis.

[34] See its first NDC submitted on 12 December 2020: https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20Kingdom%20of%20Great%20Britain%20and%20Northern%20Ireland%20First/UK%20Nationally%20Determined%20Contribution.pdf.

[35] Article 4(2) Paris Agreement.

[36] In which case a procedure will be activated, including the established Partnership Council. In the context of trade and investment agreements, see Pierre-Marie Dupuy and Jorge E. Vinuales, *Harnessing Foreign Investment to Promote Environmental Protection, Incentives and Safeguards* (Cambridge University Press 2013). On Brexit and climate change action, see House of Lords (UK), Brexit: environment and climate change, 14 February 2017, 12th Report of Session 2016–17; C. Reid, 'Brexit and the Future of UK Environmental Law' (2016) 34(4) *Journal of Energy & Natural Resource Law* 407–415.

[37] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, pp. 14–1462, Art.INST.35.4 (p. 421). Of course, the often vague provisions of the Paris Agreement can be an issue here.

because they can impact in third countries, including developing countries such as Indonesia – can be confronted by the need for justification. More specifically, Indonesia has filed – on this matter – a complaint against the EU to the WTO.[38] Such cases illustrate that the 'global leadership' role that the EU often claims should not be exclusively assessed on the basis of activities under the umbrella of the Paris Agreement but also in other contexts, such as particularly in the field of trade and investment.[39] Indeed, the Committee of the International Law Association, in its Declaration of Legal Principles Relating to Climate Change, has highlighted in Principle 10 the interrelationship of climate law with other international law, particularly international trade and investment law and international human rights law.[40] In this vein, the principle points to the need for integration by states of climate considerations into their law, policies and actions at all relevant levels. Such a duty – albeit broadly formulated – can already be found in Article 11 TFEU, stating that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' The origin of integrating the environmental concern (and thus climate change) in all other policies originates from the Single European Act (applicable from 1 July 1987),[41] but its actual implementation is a challenge to be further examined.[42]

1.2 Climate Neutrality in 2050 on EU Territory: Political Support

Across the EU institutions, political will exists for becoming carbon neutral by 2050.[43] This long-term aim, directly influenced by the need to implement the Paris Agreement and its

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[38] See the WTO dispute number DS593, *European Union – Certain measures concerning palm oil and oil palm crop-based biofuels*, with information available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm. Argentina, Colombia, Costa Rica, Guatemala, Malaysia and Thailand have joined the consultations requested by Indonesia.

[39] The Energy Charter Treaty needs for instance to be made Paris-compatible. See in this respect also Art. 3(5) UNFCCC, prohibiting arbitrary or unjustifiable discrimination or a disguised restriction on international trade when taking climate measures. See for (reducing) the external footprint of the EU the work by Joanne Scott, 'Reducing the EU's Global Environmental Footprint' (2020) 21 *German Law Journal* 10–16.

[40] International Law Association, Resolution 2/2014, Declaration of Legal Principles Relating to Climate Change, adopted during the 76th Conference, 7–11 April 2014 (discussed by Marjan Peeters, 'Environmental Principles in International Climate Change Law' in Ludwig Krämer and Emanuela Orlando, *Principles of Environmental Law* (Edward Elgar Publishing 2018) 509–524.

[41] 'Environmental protection requirements shall be a component of the Community's other policies' (Art. 130 r(2) SEA).

[42] This needs to be done in the light of Article 37 of the EU Charter of Fundamental Rights: see also the reinforcement of Article 11 TFEU by means of the 'Do no harm principle' presented in the Green Deal communication: 'All EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future' – although there is no explicit connection made between on the one hand 'Do no harm' and external action in that communication: European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council (etc.)', Brussels, 11.12.2019, COM(2019) 640 final, p. 19. However, the Commission explicitly discusses trade policies as a specific tool in the course of acting as a global leader (pp. 20–21). Concrete actions in this respect need further examination.

[43] See for instance the European Council Conclusions, 12 December 2019, https://www.consilium.europa.eu/en/press/press-releases/2019/12/12/european-council-conclusions-12-december-2019/ (accessed 2 August 2020) stating:

Article 4, will most likely be anchored in EU secondary law: the legislative process for this started with a proposal from the European Commission in March 2020 for a framework for achieving climate neutrality (henceforth called the proposed European Climate Law).[44] The title of this proposed law, and the way it is presented, is inspired by a trend, at national level, to adopt a so-called 'Climate Act', inspired by, and often including similar features to, the original UK model of 2008 (with a long-term goal, mid-term goals, an independent committee, carbon budgets, etc.).[45] Such an approach echoes a global trend to govern by goals[46] but also a need to depart from former soft governance instruments, in order to build more legal certainty for investors (although it remains to be seen to what extent the objectives and goals laid down in climate laws are enforceable in court).[47]

The way in which the European Commission presented its proposal is remarkable: its website stated that the Commission proposed 'the first European Climate Law'.[48] However, and clearly, it would not be the first legislative action on climate at EU level: the EU had already adopted important laws on climate-related matters, including after the entry into force of the Paris Agreement, such as the Regulation on the Governance of the Energy Union and Climate Action (henceforth the Governance Regulation).[49]

> In the light of the latest available science and of the need to step up global climate action, the European Council endorses the objective of achieving a climate-neutral EU by 2050, in line with the objectives of the Paris Agreement. One Member State, at this stage, cannot commit to implement this objective as far as it is concerned, and the European Council will come back to this in June 2020.

[44] European Commission, Proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) Brussels, 4.3.2020 COM(2020) 80 final 2020/0036 (COD). In the course of the legislative procedure, the Commission proposed an amendment to this law with a view to codifying a target for 2030, see Amended proposal for a Regulation of the European Parliament and of the Council on establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), Brussels, 17.9.2020 COM(2020) 563 final. We refer to this proposed law as the EU Climate Law in this chapter. The wording used by the Commission is confusing: the title says it is an 'Amended proposal', but, textually, the document proposes amendments to the proposed EU Climate Law.

[45] A. Averchenkova, S. Fankhauser and M. Nachmany, *Trends in Climate Change Legislation* (Edward Elgar Publishing 2017); H. Townsend, 'The Climate Change Act 2008: Something to Be Proud of after All?' (2009) 7(8) *Journal of Planning and Environmental Law* 842; P. McMaster, 'Climate Change – Statutory Duty or Pious Hope?' (2009) 20(1) *Journal of Environmental Law* 842; R. Macrory, 'Towards a Brave New Legal World?' in I. Backer, O. Fauchald and C. Voigt (eds), *Pro Natura* (Universitetsforlaget 2012) 306–322; M. Stallworthy, 'Legislating against Climate Change: A UK Perspective on a Sisyphean Challenge' (2009) 72(3) *Modern Law Review* 412; E. Scotford and S. Minas, 'Probing the Hidden Depths of Climate Law: Analysing National Climate Change Legislation' (2019) 28 *RECIEL* 67–81.

[46] See http://leycambioclimatico.cl/governing-by-the-goals-do-we-need-domestic-climate-laws/.

[47] D. Torney and R. O'Gorman, 'Adaptability versus Certainty in a Carbon Emissions Reduction Regime: An Assessment of the EU's Climate and Energy Policy Framework' (2020) 29 *RECIEL* 167–176.

[48] In full: 'The Commission's proposal for the first European Climate Law aims to write into law the goal set out in the European Green Deal – for Europe's economy and society to become climate-neutral by 2050'; https://ec.europa.eu/clima/policies/eu-climate-action/law_en (accessed 2 August 2020).

[49] Regulation 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC,

Actually, one of the important challenges for the EU legislator in steering towards the 2050 climate neutrality objective would be to amend existing laws, imposing concrete obligations on Member States and emitters, in order to implement an increased ambition and eventually climate neutrality by 2050 in such obligations. Indeed, while climate change was one of the specific much-debated items in the run-up to the European Parliament elections in 2019, the EU had already secured the entry into force of an impressive, though extremely complex, legal framework[50] aiming to achieve the 2030 greenhouse gas emissions reduction target of at least 40% compared to 1990.[51] Table 4.1 gives an account of the most important legislation enacted to aim to reach this 40% reduction.

The long-term ambition of the European Commission vested in its proposal for the EU Climate Law seems to have a great chance of getting codified. During the elections of the European Parliament, held between 23 and 26 May 2019 together with the subsequent nomination of the president of the new European Commission serving from 2019 to 2024, political willingness was already being expressed to move to more ambitious emission reduction goals.[52]

In a new Regulation from 2018, hence adopted after the entry into force of the Paris Agreement but before the EU elections in 2019, being the Regulation on the Governance of the Energy Union and Climate Action,[53] the Commission was invited to develop an analysis regarding the contribution by the Union to the commitments of the Paris Agreement, 'includ-

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2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council [2018] OJ L328/1 (Governance Regulation). See for a discussion: Estelle Brosset and Sandrine Maljean-Dubois, 'The Paris Agreement, EU Climate Law and the Energy Union' in Marjan Peeters and Mariolina Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) Chapter 26.

[50] Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action [2018] OJ L328/1 (Governance Regulation); Directive (EU) 2018/410 amending Directive 2003/87/EC on the EU emissions trading system [2018] OJ L76/3 (ETS Amending Directive); Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement [2018] OJ L156/26 (Effort Sharing Regulation); Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land-use change and forestry in the 2030 climate and energy framework [2018] OJ L156/1 (LULUCF Regulation); Parliament and Council Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82 (Renewable Energy Directive); and Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency [2018] OJ L328/210 (Energy Efficiency Directive). See Torney and O'Gorman (n. 47) for a description of each of these items; for the complexity of understanding the (new) EU climate law, see Peeters (n. 10).

[51] The decrease of emissions could be even higher than the legal target: EEA Report 13/2020, Tracking progress towards Europe's climate and energy targets; SWD(2020) 176 final, Impact assessment, Stepping up Europe's 2030 climate ambition, 17 September 2020.

[52] These elections have resulted in an increase of seats for Green politicians (cooperating in the European political party – in which national political parties cooperate – called 'Greens/EFA'; EFA stands for European Free Alliance). However, the support for Green politicians is quite unevenly distributed across EU Member States; for more information, see for instance, https://www.election-results.eu/european-results/2019-2024/ (accessed 2 August 2020), where the distribution of votes in individual Member States can also be viewed: in Germany the Greens saw an increase in seats, but they did not win any seats at all in Bulgaria, Cyprus, Slovenia and Poland.

[53] See above: the proposed EU Climate Law includes provisions to amend this Regulation.

Table 4.1 Most relevant existing EU climate legislation for reducing greenhouse gas emissions

Legislative basis	Legislative act (secondary law)	Impact on mitigation	Main content	Reduction target
Energy – 194 TFEU & Environment – 192 TFEU	*Governance, monitoring*			
	Regulation 2018/1999 on the Governance of the Energy Union and Climate Action	Indirect	A governance mechanism, consistent with the Paris Agreement. Imposes on MS the adoption of integrated energy and climate plans and includes a monitoring mechanism. Reviews tasks for the European Commission	Codification of the Union's 2030 targets for energy and climate (see Article 1 with Article 2(11) of the Regulation), including the Union-wide binding target of at least 40% domestic reduction in economy-wide greenhouse gas emissions as compared to 1990 to be achieved by 2030
Environment – 192 TFEU	*Large industry and intra EU/EEA aviation*			
	Emission Trading Scheme (revision by Directive 2018/410)	Direct	A cap & trade mechanism for greenhouse gas emissions applicable to large industries and intra EU/EEA aviation	A Union-wide limit on the quantity of allowances, with an annual decrease by a linear factor of 2.2%
	Small industries, Housing, road transport, etc., so-called 'non ETS sectors'			
	Effort Sharing Regulation 2018/842	Direct	Individual binding emission reduction targets (and flexibilities for compliance) for Member States based on a trajectory until 2030	Shares of the Union-wide target by means of an EU-wide 30% reduction below 2005 levels by 2030 in the non-ETS sectors
	Regulation 2019/631 (CO_2 emission performance standards for new passenger cars)	Direct	CO_2 emissions performance requirements for new passenger cars and for new light commercial vehicles	Various EU fleet-wide targets, with flexibilities
	Regulation 2019/1242 (CO_2 emission performance standards for new heavy-duty vehicles)	Direct	CO_2 emission performance requirements for new heavy-duty vehicles	15% (2015), 30% (2030), with flexibilities
	Regulation 2018/841 on emissions and removals from land use, land use change and forestry	Direct	For land use and forestry: emissions shall be equal to absorption (but flexibilities are provided)	By 2025 and 2020, each Member State shall ensure that emissions do not exceed removals

Legislative basis	Legislative act (secondary law)	Impact on mitigation	Main content	Reduction target
Energy – 194 TFEU	Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency	Indirect	A common framework of measures to promote energy efficiency within the Union	The Union's 2020 energy consumption has to be no more than 1483 Mtoe of primary energy or no more than 1086 Mtoe of final energy. Imposes a Union-wide 2030 headline target on energy efficiency of at least 32.5%
	Renewables Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources	Indirect	A common framework for the promotion of energy from renewable sources	Imposes a Union-wide target of 32% for the overall share of energy from renewable sources in the Union's gross final consumption of energy in 2030

Notes: Selected main legislative acts from the European Parliament and the Council, as adopted since the entry into force of the Paris Agreement (November 2016) and before March 2020 (date of the proposal for the European Climate Law), with the purpose of mitigating greenhouse gas emissions in view of reaching the at least 40% emission reduction target by 2030. The majority of these measures, if not all, will need to be amended in view of the increased ambition of the European Union for 2030. Please note that this schedule is not comprehensive, since other instruments are relevant as well, such as the carbon capture and storage Directive (Directive 2009/31/EC). The measures are arranged according to their legislative basis.

ing various scenarios, inter alia a scenario on achieving net zero GHG emissions within the Union by 2050 and negative emissions thereafter and their implications on the global and Union carbon budget'.[54] At the same time, the EU legislator points towards the global dimension by stating:

> Although the Union pledged to deliver ambitious cuts in GHG emissions by 2030, the threat of climate change is a global issue. The Union and its Member States should therefore work with their international partners in order to ensure *a high level of ambition* by all Parties in line with the long-term goals of the Paris Agreement.[55] (Emphasis added)

Whether this statement indicates that the EU may decide not to follow the *highest* ambitious path if other major emitters do not take sufficient responsibility is an important discussion for the near future,[56] as is also the case in relation to global stocktakes as regulated by Article 14 of the Paris Agreement. Of course, such discussions will need to take place in the various institutions, including the Council and the European Parliament.[57] The European Commission at least holds the following: 'While the EU cannot solve climate change without others also acting, being responsible for less than 10% of global greenhouse gas emissions, it is a leader in the global transition towards a net-zero-greenhouse gas emissions economy.'[58] While one can doubt whether the other players internationally see the EU as their leader,[59] the EU can indeed claim to be one of the leading parties in view of having codified quite ambitious climate laws internally, and because it is trying to step up its ambition. At the same time, the Commission

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[54] Regulation 2018/1999, Governance Energy Union and Climate Action, preamble 10.

[55] Regulation 2018/1999, Governance Energy Union and Climate Action, preamble 11.

[56] Delphine Misonne, 'The Importance of Setting a Target: The EU Ambition of a High Level of Protection' (2015) 4(1) *Transnational Environmental Law* 11–36. The requirement to achieve a high level of protection does not impose the highest possible ambition when the legal base of the measure is Article 192 TFEU, as Member States keep the possibility of strengthening the level of protection to themselves. Adopting more stringent measures than the international obligations has been recognised, by the ECJ, as an indicator of a high level of protection (ibid., p. 17).

[57] The European Parliament has already made ambitious observations with regard to the objective of climate neutrality in its resolution of 14 March 2019: European Parliament resolution of 14 March 2019 on climate change – a European strategic long-term vision for a prosperous, modern, competitive and climate-neutral economy in accordance with the Paris Agreement: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0217_EN.html, stating:

> Welcomes the inclusion of two pathways aimed at reaching net-zero GHG emissions by 2050 and the Commission's support for these, and considers the mid-century objective as the only one compatible with the Union's commitments under the Paris Agreement; regrets the fact that no net-zero GHG pathways for before 2050 were considered in the strategy.

Interestingly, such statements reveal a more ambitious stance than the Paris Agreement, of which Article 4(1) refers to achieving 'a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century'. Importantly, this Article 4(1) is about a global balance, while the EU could (or should) interpret its obligations under the Paris Agreement as leading to more ambitious actions and hence achieving climate neutrality on its territory earlier. To arrive at such a decision, a due consideration of the principle of proportionality would probably be necessary, although legal research on that matter has yet to develop (as far as is known to us).

[58] European Commission, Proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) Brussels, 4.3.2020 COM(2020) 80 final 2020/0036 (COD), p. 3.

[59] See in this respect also the critical observations by Brosset and Maljean-Dubois (n. 49).

also points to the level playing field it wants to uphold at the international level.[60] Further guidance on that matter from the European Council will be key, although it is the EU legislator who can take measures such as imposing an eventual carbon border tax.[61]

1.3 The Proposed Legal Framework for Climate Neutrality in 2050 and the New(?) Principle of Do No Harm

The proposed Regulation introduces a 'climate neutrality objective', which means that Union-wide emissions and removals of greenhouse gases regulated in Union law shall be balanced at the latest by 2050, thus reducing emissions to net zero by that date.[62] This codification of climate neutrality in EU law provides the keystone, establishing the ultimate aim of EU climate law. While the European Union has already been applying *a rule-based approach* to addressing climate change for some time, as can be illustrated by the introduction of the EU Emissions Trading Directive in 2003 (even before the entry into force of the Kyoto Protocol), the codification of the long-term goal reaffirms this tradition.

The question is, however, how the path towards achieving climate neutrality will be governed, and how to deal with unforeseen positive and negative circumstances, including the developments of science, technological innovation, and the economy in a few decades from now – with health crises being among other potential yet unknown emergencies.[63] This is one of the main issues in adopting such a long-term aim through legislative or even constitutional instruments: if their very *ratio legis* is to create long-term security, to what extent will this then be respected by the authorities at EU and national level, and, if this falls short, to what extent is the path towards the long-term aim enforceable through the courts? In light of taking steps to achieve the ultimate aim, in the course of the legislative procedure for the EU Climate Law, a strengthening of the 2030 target has already been undertaken, which also updates the EU's nationally determined contribution.[64] The European Council, again providing political guidance (and not having legislative power), has *endorsed* in its meeting of 10–11 December 2020 'a binding EU target of a net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990'.[65]

In order to have a mechanism to (try to) ensure the achievement of the long-term aim, the Climate Law proposal has a provision regarding a *trajectory* which requires the Commission

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[60] 'The EU will keep promoting and implementing ambitious climate policy across the world, including in the context of a strong climate diplomacy, and engaging intensely with all partners to increase the collective effort while at the same time ensuring a level playing field.' See the proposal from the Commission for the European Climate Law, p. 3.

[61] According to the indicative timetable from the European Commission related to the Green Deal, a proposal for a carbon border adjustment mechanism for selected sectors is scheduled for 2021. See the Annex to the Communication on the European Green Deal, available at https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_2&format=PDF.

[62] Commission proposal, Art. 2.

[63] Obviously, this question is also relevant for national laws codifying long-term goals, such as the Climate Change Act, adopted in 2008 in the United Kingdom.

[64] See above section 2.1.

[65] https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf under para. 12.

to assess periodically progress towards the 2050 objective.[66] It is indeed exactly the path towards reaching the aim that will be decisive for success. This path consists of multiple elements, which also have to be regulated in legislation other than in the EU Climate Law, such as the gradually decreasing cap of the EU ETS. One of the options for establishing a more ambitious EU climate law policy is to let the cap decline much faster, which of course has to be regulated by law. Such steps are, however, not the subject of the proposed EU Climate Law, but require additional legislative action at EU level. Central to the current situation is that in the EU, emission reduction objectives are endorsed or even codified before the specific legislative amendments, stipulating the precise obligations relevant for emitters, are clear.[67]

With regard to the trajectory, the Commission proposes to be empowered to adopt so-called delegated acts for an indeterminate period of time (Art. 3). This eventual delegation of powers raises concerns in view of the limits formulated by EU treaty law, which in essence preserves that essential decisions have to be taken by the ordinary EU legislator.[68] Article 290 TFEU subjects the delegation to strict conditions, *in order to preserve democratic accountability in EU rule-making*.[69]

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[66] The notion of trajectory is not defined in the Commission proposal of March 2020. However, it mentions that 'the trajectory shall start from the Union's 2030 target for climate referred to in Article 2(3)', a conditional item as it only establishes that 'by September 2020, the Commission shall review the Union's 2030 target for climate referred to in Article 2(11) of Regulation (EU) 2018/1999 in light of the climate-neutrality objective set out in Article 2(1) and explore options for a new 2030 target of 50 to 55% emission reductions compared to 1990.' The deadline has not been met, but it is worth mentioning that Article 2(11) of Regulation 2018/1999 encompasses a moving target anyway: '"the Union's 2030 targets for energy and climate" means the Union-wide binding target of … or any subsequent targets in this regard agreed by the European Council or by the European Parliament and by the Council for 2030'.

[67] Illustrative are the European Council conclusions of 10–11 December 2020 (n. 31) endorsing a more ambitious target of 55% in 2030, but the Council at the same time

> invites the Commission to assess how all economic sectors can best contribute to the 2030 target and to make the necessary proposals, accompanied by an in depth examination of the environmental, economic and social impact at Member State level, taking into account national energy and climate plans and reviewing existing flexibilities.

At the time of writing this chapter, the Commission has planned to publish specific legislative proposals in June 2021, and it is not clear when the decision-making on the EU Climate Law proposal, including the 2030 target, will be finished.

[68] This concerns Article 290 TFEU; see Merijn Chamon and Marjan Peeters, https://www.maastrichtuniversity.nl/blog/2020/03/european-climate-law-too-much-power-commission, 30 March 2020.

[69] As recalled by AG Jääskinen in Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2013], §76. The Court held as follows in Case C-355/10 *Parliament v Council* [2012] ECR at paragraphs 64–66:

> According to settled case-law, the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union … The essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated … Thus, provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated … It follows from this that implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements.

See generally on Article 290, C. Blumann, 'À la frontière de la fonction législative et de la fonction exécutive: les « nouveaux » actes délégués', *Mélanges en l'honneur de Jean Paul Jacqué* (Dalloz 2010) 127–144; C. Garzón, 'Les actes délégués dans le système des sources du droit de l'Union Européenne' (2011) 12 *ERA Forum* 105–134.

In the present case, the delegation to the Commission is not restricted in time and concerns 'the trajectory', a notion which is not clearly defined.[70]

Looking at competences, there might be an even bigger problem: as Ludwig Krämer observes, 'it is doubtful, whether Article 192(1) TFEU is the appropriate legal basis'.[71] He grounds this observation on the significant impact the EU Climate Law would have on the energy structure of the Member States.

Another important element of the Commission proposal is establishing a 'framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement'.[72] Hence, both mitigation and adaptation are addressed in this proposed law, which, as such, need very different policy responses.[73] However, it also needs consideration to what extent adaptation measures can be based on the environmental competence, including Article 192(1) TFEU: it depends on how widely adaptation needs to be interpreted, and whether it also covers town and country planning.[74]

The short discussion above illustrates that the proposed EU Climate Law contains without doubt new, yet unexplored elements to EU climate legislation, such as the trajectory with powers for the Commission. Actually, the notion of 'law' (mentioned in the title of the EU Climate Law) as an instrument for EU action does not exist under European Union primary law.[75] The proposal aims to establish a Regulation, a legislative act that shall be binding in its entirety and directly applicable in all Member States and to EU institutions, including the European Environment Agency.[76] The reason for the Regulation emanates from the need to strengthen the EU's climate ambition.[77] However, another possible reason, not formally expressed, is the need to emphasise the power of the EU *lawmaker* (the Council and the Parliament), where that legislative power has actually been partly captured, in practice, by the European Council, beyond its role to give a main political impetus to European institutions (and where Member States also retain a veto right, with decisions being obtained by consen-

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[70] Chamon and Peeters (n. 68).

[71] Ludwig Krämer, 'Planning for Climate and the Environment: The EU Green Deal' (2020) 17 *Journal for European Environmental & Planning Law* 267–306, at 270.

[72] Commission proposal, Art.1.

[73] We will not delve further into the adaptation element, although we want to flag that in light of the principle of subsidiarity, adaptation at EU level is more debatable than mitigation action.

[74] See Article 192(2) TFEU with unanimity requirements in the Council. See also Cathrine Ramstad Wenger, 'Article 7 Adaptation', in Geert van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar Publishing 2021) 172–199.

[75] Article 288 TFEU mentions particularly regulations, directives and decisions. The term 'law' was perhaps put in the title based on communication needs.

[76] Article 288 TFEU – see also the proposal at p. 5. Remarkably, the Commission does not elaborate on the bindingness of the climate neutrality objective for the Union itself, but only refers to requirements for the Commission and the EEA. However, Article 2 states that 'The relevant Union institutions and the Member States shall take the necessary measures at Union and national level respectively, to enable the collective achievement of the climate-neutrality objective'. Of course, the enforceability of such obligations will be an interesting issue, but hopefully legal action to enforce compliance will not be needed. Unfortunately, the Commission does not explain the (legal) consequences if the EU objectives (targets) are not reached.

[77] The existing level of policy ambition for 2030 is not sufficient to allow for a gradual transition to a climate-neutral EU economy by 2050 (p. 8) and the analysis of various policy developments shows that the current policies are insufficient for the EU to reach the 2050 climate-neutrality objective (p. 15).

sus).[78] Finally, the European Commission wants an instrument capable of pulling together 'all EU actions and policies', to help the EU to achieve a successful and just transition towards climate neutrality and a sustainable future, as stated in the European Green Deal.[79]

This Green Deal had put forward a new policy principle, called a green oath, to 'do no harm'.[80] This new expression, also included in the proposal for the Eighth Environment Action Programme, relates to the aim to 'increase coherence and synergies between actions across all levels of governance by measuring progress towards environmental and climate objectives in an integrated way'.[81] In essence, 'all EU initiatives'[82] would have to be aligned to this oath not to harm. The glossy expression necessarily calls up a positive mindset. While the expression 'do no harm' is – in our view – self-evident, it also sounds familiar in light of the customary no-harm principle, the cornerstone of international environmental law. The purpose of the expression 'do no harm' (to avoid inconsistencies among EU policies and goals in light of the environmental objectives) implies that the European Commission has a truly different understanding of this concept compared to the well-known customary law principle that addresses behaviour between states. The main provision in this regard put forward by the EU Climate Law proposal is that the Commission 'shall assess any draft measure or legislative proposal in light of the climate-neutrality objective' and the related trajectory.[83] This strengthening, particularly its specification towards the climate change problem, of Article 11 TFEU is obviously a formidable challenge, and it will be interesting to see whether the strong emphasis on aligning all action in view of achieving the climate objective, including by using the appealing (but legally unclear) term 'oath', will have some relevance in court.[84] Nonetheless, there are already signs of watering down the concept, since in the political agreement on the expenditure on the Recovery and Resilience Facility, the principle is suddenly called 'do no significant harm' – and is as such welcomed by the Commission …[85]

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[78] See the earlier reflection on the European Council urging consensus by the EU legislature: Marjan Peeters, 'An EU Law Perspective on the Paris Agreement: Will the EU Consider Strengthening its Mitigation Effort?' (2016) 6 *Climate Law* 182–195, at 191–192.

[79] Commission proposal, EU Climate Law, p. 4.

[80] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council (etc.), Brussels, 11.12.2019, COM(2019) 640 final, p. 19.

[81] Commission in its proposal for the eight General Union Environment Action Programme, COM/2020/652 final from 14 October 2020, p. 3.

[82] Ibid., p. 4: 'The Commission announced it will improve the way its better regulation guidelines and supporting tools address sustainability and innovation issues, with the objective that all EU initiatives live up to a green oath to "do no harm".'

[83] Article 5(4) Commission proposal EU Climate Law.

[84] However, for hurdles to reaching the courts, see Sebastian Bechtel, Client Earth, 17 June 2020, at https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/updates/the-european-climate-law-and-access-to-justice/.

[85] European Commission, press release 18 December 2020: Commission welcomes political agreement on Recovery and Resilience Facility, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2397 (accessed 24 December 2020). Article 17, Taxonomy Regulation (see section 2.4), as already accompanied by a Commission Technical Guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation (COM(2021) 1054 final, 12.02.2021).

1.4 Selected Key Issues from the European Parliament

The European Parliament adopted on 8 October 2020 many amendments to the proposed EU Climate Law, including important changes.[86] This section sheds light on only a few of them. At the time of writing, the legislative process is ongoing, including the negotiations, also known as a trilogue.[87]

First, an important amendment departs from the collective nature of the objective of climate neutrality, when adding that 'Each Member State shall achieve net zero greenhouse gas emissions by 2050 at the latest.'[88] In our view, this is a fundamentally different view of what the European Union is or could be: with individual national climate neutrality, in its purest form, no use can be made of cost-effective options by taking the Union as a whole. For instance, it raises the question of whether this would mean individual caps under the EU ETS (and how to do so for aviation?).

Secondly, the establishment of the trajectory is connected to the need for appropriate legislative proposals.[89] In this respect, the European Parliament (EP) wants to keep power regarding setting out the path towards 2050.[90]

Regarding the Union's 2030 target for climate, the EP wants an emissions reduction of 60% compared to 1990.[91] While the EP accepts a net objective for 2050, it does not mention this *explicitly* in its amendment for the 2030 target.[92] In connection with this more ambitious 2030 target, the European Commission shall assess, by June 2021, how 'all of the Union legislation relevant for the fulfilment of the Union's 2030 target for climate and other relevant Union legislation promoting the circular economy and contributing to reduce greenhouse gas emissions' would need to be amended. As observed above, the legislative approach by the EU, at least this EP approach, is first to set (strong) targets and then to consider the implementation of them. Further reflection on whether this use of codification is the best regulatory choice to take is needed.

Thirdly, the EP adopted an amendment introducing an access to justice provision within Member States.[93] Earlier, a plea for better access to justice possibilities at EU and national

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[86] Amendments adopted by the European Parliament on 8 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD)); https://www.europarl.europa.eu/doceo/document/TA-9-2020-0253_EN.html; see for the procedure: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0036(COD)&l=en.

[87] The trilogue entails an informal meeting of representatives of the three relevant legislative institutions (the Council, the European Parliament, and the Commission). See also Peeters (n. 78), 193.

[88] European Parliament (n. 86), Amendment of Article 2 (p. 44).

[89] European Parliament (n. 86), Amendment of Article 3 (p. 50).

[90] The need to comply with the main goal of Union environmental policy, which is to achieve a high level of (climate) protection, is nowhere to be recalled, although the level of protection is of course specifically formulated: to achieve climate neutrality by 2050.

[91] European Parliament (n. 86), Amendment of Article 2(a), p. 55.

[92] European Parliament (n. 86): Article 2(a) does not mention 'net' so it can be read as a far more ambitious absolute target: 'The Union's 2030 target for climate shall be an emissions reduction of 60% compared to 1990'. We did not investigate (for instance by means of interviews) whether any further explanation is given of this.

[93] European Parliament (n. 86), Amendment inserting a new Article 11(a) (p. 66).

level, related to the EU climate law, was made.[94] Clearly, access to justice would harden the governance approach and could help, as pointed out more generally by Verschuuren, in promoting the implementation of EU law in legal practice,[95] although it is yet to be examined how wide and intense this adjudication would be in the specific case of the (often procedural type of) provisions as established by the governance approach. Nonetheless, harmonising access to justice regarding national decisions under the EU Climate Law and the Governance Regulation would establish a level playing field particularly with regard to standing. If this were to be adopted, its relevance in practice remains to be seen, particularly in view of the fundamental discussion raging in certain EU countries on the role of the judiciary.[96]

The highlights above regarding the amendments by the EP show how challenging the various topics to be decided upon are, ranging from setting the targets, including the decision whether to allow for a *net* target by 2030, and the decision whether climate neutrality should be an obligation for every Member State individually, to providing access to justice as a means to harden the governance approach by enabling litigation.

2 THE EU COMPETENCE AND EU CLIMATE LAW INSTRUMENTS

2.1 The EU's (Limited) Competence to Address Climate Change

While the proposal for the EU Climate Law is, at the time of writing this chapter, still being discussed by the EU legislator, EU climate law already consists of a huge package of laws. Before delving into the specific EU climate law instruments, this section first discusses the EU's internal competence regarding climate change. This internal competence emerged, in a logic of mitigating emissions, from its powers in the field of environmental protection.[97] The post-Rio and post-Kyoto packages were all based on the environmental chapter of primary law.[98]

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[94] Client Earth (Sebastian Bechtel), 17 June 2020, https://www.clientearth.org/the-european-climate-law-and-access-to-justice/.

[95] J. Verschuuren, 'The Netherlands' in K. Kotze et al. (eds), *The Role of the Judiciary in Environmental Governance* (Wolters Kluwer 2009), 55–83. Verschuuren also points to the fact that access to justice helps to promote a level playing field for businesses.

[96] And also leading to CJEU case law; see for instance, Marco Antonio Simonelli, 'Thickening up judicial independence: the ECJ ruling in Commission v. Poland (C-619/18)' https://europeanlawblog.eu/2019/07/08/thickening-up-judicial-independence-the-ecj-ruling-in-commission-v-poland-c-619-18/.

[97] As to the external competence, see for instance E. Morgera (ed.), *The External Environmental Policy of the European Union* (Cambridge University Press 2012). The negotiating powers of the European Union in the field of climate change were, since the first multilateral negotiations, based upon the environmental chapter of the Treaty, which was made clearer after Lisbon when the words 'and in particular combating climate change' were added to 'promoting measures at international level to deal with regional or worldwide environmental problems'.

[98] The first modest package of measures, adopted after the adoption of the UNFCCC, included a Council Directive 93/76/EEC of 13 September 1993 to limit carbon dioxide emissions by improving energy efficiency (SAVE) and a Council decision of 24 June 1993 for a monitoring mechanism of Community CO_2 and other greenhouse gas emissions, which were both adopted on basis of the environmental chapter. They were accompanied by a decision to promote renewable energy, the launch of

However, it is through the new competence on energy, as established by the Lisbon Treaty, that various legislative acts were justified in very recent years. For example, the Governance Regulation is based on both environmental competence (Article 192 TFEU) and on energy competence (Article 194 TFEU).[99] Hence, climate policies have largely become energy policies, while also often remaining environmental ones. However, some regulatory approaches were recently moved from one legal base to the other, once the Lisbon Treaty had established the chapter on energy.[100]

Even while the need to pursue a high level of environmental protection applies to all Union policy given the integration principle,[101] one must observe that EU competence in the field of energy is narrower than its competence in the field of the environment. The energy competence is conditional on 'the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment' (Art. 194, §1 TFEU), whereas the environmental base is autonomous, not in any way conditional on the establishment and functioning of the internal market (Article 191 TFEU), and, moreover, shall aim at a high level of protection.[102] The EU gained more power on environmental issues than on energy ones, where the conferral of power is restricted, a paradoxical situation when one knows that the European Economic Community was rooted in a need to mutualise the control of an essential energy source such as coal, leading to the founding of the European Coal and Steel Community in 1951.

The energy chapter mentions that Union policy on energy 'shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply', except if this occurs on the basis of the environmental chapter, and therefore for environmental reasons, taking due account of Article 192(2)(c). This Article enables the Union to adopt environmental legislation significantly affecting a Member State's choice between different energy sources and

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a programme called Altener. The post-Kyoto package, including Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity from renewable energy sources in the internal electricity market, Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings and the launch of a carbon market with Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, and even Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, were also based on the environmental chapter.

[99] Article 194 TFEU:

> In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

See also Karen Makuch and Ricardo Pereira, *Environmental and Energy Law* (Wiley Blackwell 2012); John Birger Skjaerseth et al., *Linking EU Climate and Energy Policies* (Edward Elgar Publishing 2016).

[100] P. Thieffry, *Traité de droit de l'environnement et du Climat* (Bruylant 2020) 1605, explaining the transformation of Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings into Directive 2010/31 of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings.

[101] See Art. 11 TFEU and Art. 37 Charter.

[102] Article 191(2) TFEU.

the general structure of its energy supply, on the condition that it is decided by the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.[103] Hence, it is possible to impact significantly a Member State's choice between different energy sources, on the condition that the goal being pursued ranks among the main objectives of the EU on the environment (and mitigation of greenhouse gases is one of them) but also that all 27 Member States fully agree. This constitutes a block to achieving by means of law – at the EU level – a true industrial revolution in the energy sector: the Member States detain a veto right.[104] By contrast to EU environmental policies, EU energy policies still largely remain under the control of individual states – and this can be illustrated by the following statement from the European Council from December 2020: 'to respect the right of the Member States to decide on their energy mix and to choose the most appropriate technologies to achieve collectively the 2030 climate target, including transitional technologies such as gas'.[105]

This situation explains some European legislation that is actually only slightly prescriptive on content but heavily demanding on administrative processes. The Governance Regulation is symptomatic in that regard. Mimicking the managerial approach established by the Paris Agreement, in which parties are asked to plan in order to meet, on time, a collective objective, the Regulation imposes a heavy planning process on all Member States.[106]

EU action on climate has always been imagined *within* the system of competences for secondary law but more attention to improving primary law could be a means to better acknowledge the severity of the issue. From its very start, the European Economic Community was created in close relation to energy concerns. Its roots are to be found in the European Coal and Steel Community of 1951. The 1957 Treaties included the Euratom Treaty, the aim of which was no less than to facilitate investment in nuclear energy and to create the conditions necessary for the speedy establishment and growth of nuclear industries. On renewables, to implement the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the European Community first tabled a very modest Council Decision to promote renewable energy[107] and, even though the idea of a Treaty for the promotion of renewable energy sources

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[103] The topics for which unanimity in the Council is required, as specified in Article 192(2) TFEU, are interpreted narrowly by the CJEU; see the analysis by Helle Tegner Anker, 'Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities' in Marjan Peeters and Mariolina Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 7–21, at 14.

[104] See for an earlier discussion of this issue – including case law – Helle Tegner Anker (n. 103), and earlier: Marjan Peeters, 'Governing towards Renewable Energy in the EU: Competences, Instruments and Procedures' (2014) 21(1) *Maastricht Journal of European and Comparative Law* 39–63.

[105] European Council, Conclusions 10–11 December 2020, https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf.

[106] The proposed EU Climate Law, discussed in section 2, also imposes new collective goals, without being prescriptive on content, on Member States.

[107] Decision 93/500 concerning the promotion of renewable energy sources in the Community (1993) OL L235. See C. Streck and D. Freestone, 'The EU and Climate Change', in R. Macrory (ed.), *Reflections on 30 Years of EU Environmental Law* (Europa Law Publishing 2006), 100.

was once suggested in a resolution of the European Parliament in the late 1990s,[108] it never moved in that direction.

In the CJEU judgment on the Hinkley Point case set down on 22 September 2020,[109] one can observe how important it can be for a new source of energy to be promoted by a legal act having the same legal value as the Lisbon Treaty. Austria contested before the CJEU the Commission decision declaring the United Kingdom's financial support to Hinkley Point C nuclear power station in the UK compatible with the internal market, on the ground that the construction of a new nuclear power station does not constitute an objective of common interest, under the meaning of state aid (Article 107 TFEU), drawing links between such support and the potential negative impact on the promotion of renewable energy sources.[110] The Court, in Grand Chamber, confirmed that the second subparagraph of Article 194(2) TFEU provides that the measures adopted by the European Parliament and the Council are not to affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, and does not preclude that choice from being nuclear energy.[111] Thus, since the choice of nuclear energy is, under those provisions of the TFEU, a matter for the Member States, 'it is apparent that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty, as recalled in the judgment – the development of a powerful nuclear industry – do not conflict',[112] and cannot be regarded as precluding, in all circumstances, the grant of state aid for the construction or operation of a nuclear power plant.[113]

This case demonstrates that it is not inconsequential for the nuclear industry to benefit from the support of a specific treaty, the Euratom Treaty. One can wonder why the wish to promote new sources of energy, such as renewables, does not also translate into the same kind of instrument with the same legal rank. If the EU wants to think big on climate neutrality and renewables, it may need to get inspired by the process and very existence of the Euratom Treaty.[114]

If the EU wants to achieve an ambition such as a zero pollution and a climate-neutral society, as put forward by the von der Leyen Commission, or even a new industrial revolution,

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[108] White Paper for a Community Strategy and Action Plan COM(97)599 final (26/11/97), at 9, referring to PE 221/398.fin.

[109] Case C-594/18P *Austria v Commission* ECLI:EU:C:2020:742. Alicja Sikora, 'Applicability of the EU State Aid and Environmental Rules in the Nuclear Energy Sector, Annotation on the Judgment of the Court of Justice (Grand Chamber) of 22 September 2020 in Case C-594/18 P Republic of Austria v Commission (ESTAL)' (2020) 19(4) *European State Aid Law Quarterly* 515–520.

[110] Paras 36 and 37.

[111] Para. 48.

[112] Para. 33.

[113] Paras 48 and 49. The Court asserts that the Euratom Treaty and the TFEU *have the same legal value*, as illustrated by Article 106a(3) of the Euratom Treaty (para. 32). Accordingly, the provisions of the TEU and TFEU are not to derogate from the provisions of the Euratom Treaty; the rules of the TFEU apply in the nuclear energy sector when the Euratom Treaty does not contain specific rules, such as rules of EU law on the environment: para. 41. Therefore, the Euratom Treaty does not preclude the application in that sector of the rules of EU law on the environment. See also judgment of 27 October 2009, *ČEZ*, C-115/08, EU:C:2009:660, paragraphs 87 to 91. Markus Möstl, 'Case C-115/08, *Land Oberösterreich v ČEZ*, Judgment of the Court of Justice (Grand Chamber) of 27 October 2008' (2010) 47(4) *Common Market Law Review* 1221–1232.

[114] To look further into reasons for the asymmetric approaches, see among others R. Engstedt, *Handbook on European Nuclear Law: Competences of the Euratom Community under the Euratom Treaty* (Kluwer 2020).

it must be endowed with an institutional framework that actually matches that ambition, even within its own existing primary law. This may not yet be the case. Are the European Treaties Paris-proof? An academic discussion on that aspect has not even started. Meanwhile, and realistically, any further transposition of powers from national level to EU level – for instance in the field of renewable energy – will most likely face political resistance at the national level.

2.2 Core Legal Instruments Regulating Emission Reduction

Despite restricted powers, the EU has been rather successful at putting forward legally binding emission reductions.[115] Such emission reductions are mainly enforced by precise obligations put on industries and Member States, and the outcome in terms of emission reduction is, until 2020, and taken as a whole, successful in the sense that emissions have dropped by 24% in 2019, even during economic growth.[116] The three core instruments are respectively the Effort Sharing approach,[117] specifying individual emission reduction pathways and targets for Member States until 2030, the EU Emissions Trading Scheme,[118] setting an annually decreasing EU-wide cap on emissions from covered industries and aviation, and the LULUCF, establishing that the sum of emissions and removals by land and forestry has to be zero.

The regulation of gases not covered by these three instruments should not be overlooked but generally gets less attention in legal scholarship.[119] One of the climate-related concerns is the production of water vapour by aviation, currently not regulated.[120] Another important

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[115] One can even argue that putting forward various legislative instruments, targeting multiple aims, such as emission reductions, renewable energy, and energy efficiency, leads to – to put it mildly – a mess of instruments instead of a proper mix. See Marjan Peeters, 'Instrument Mix or Instrument Mess? The Administrative Complexity of the EU Legislative Package for Climate Change' in Marjan Peeters and Rosa Uylenburg, *EU Environmental Legislation: Legal Perspectives on Regulatory Strategies* (Edward Elgar Publishing 2014) 173–192.

[116] According to the EEA:

> Since 1990, greenhouse gas emissions in the EU have been steadily declining, with emissions in the EU-27 falling to 24% below 1990 levels in 2019. This highlights the results of effective climate policies implemented across the EU and shows that it is clearly possible to achieve more ambitious reduction targets by 2030, paving the way for a climate neutral EU by 2050.

EEA, 'EU on track to meet greenhouse gas emissions and renewable energy 2020 targets, progress in 2019 shows more ambitious long-term objectives are reachable', News, 30 November 2020 (on file with authors). Importantly, however, the EEA notes that 'In 2019, preliminary estimates point towards 12 countries with emission levels greater than their annual targets: Austria, Belgium, Bulgaria, Cyprus, Czechia, Estonia, Finland, Germany, Ireland, Luxembourg, Malta and Poland' (same source).

[117] Marjan Peeters and Natassa Athanasiadou, 'The Continued Effort Sharing Approach in EU Climate Law: Binding Targets, Challenging Enforcement?' (2020) 29 *RECIEL* 201–211.

[118] There is a lot of literature about the EU ETS; see for a recent discussion, Stefan Weishaar, 'EU Emissions Trading: Its Regulatory Evolution and the Role of the Court' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook of EU Environmental Law* (Edward Elgar Publishing 2020).

[119] The Commission states 'Non-CO_2 emissions of methane, nitrous oxide and so-called F-gases represent almost 20% of the EU's greenhouse gas emissions. By 2030, these can be reduced effectively by up to 35% compared to 2015.' See Commission Communication 'Stepping up Europe's 2030 climate ambition' (COM(2020)562 from 17 September 2020, p. 11. If we understand the communication correctly, there is no strengthening proposed for these F-gases until 2030.

[120] But it is a complex issue with uncertainties regarding the impacts of non-CO_2 gases on climate change (nonetheless, less aviation would reduce such impacts!). See on the non-CO_2 emissions from aviation: Commission Staff Working Document, Full-length report Accompanying the document Report

element is the regulation of hydrofluorocarbons (HFCs), which are harmful greenhouse gases (climate-warming fluorinated gases) regulated at international level in the 1987 Montreal Protocol on Ozone Depleting Substances, particularly by its 2016 Kigali Amendment (in force since 1 January 2019).[121] This amendment was needed to establish a framework for controlling the replacements for substances that were reduced by the Montreal Protocol, that were not depleting the ozone layer, but were contributing to climate change.[122] This is one important practical example of how the control of an environmental problem can shift pollution and harm to another environmental medium – which the von der Leyen Commission wants to prevent by means of the 'do not harm' principle, as explained above. Consequently, HFC gases are covered by the proposed EU climate law,[123] illustrating the great width of the EU climate law approach.[124] Meanwhile, it is a true challenge to develop a package of rules that steers the reduction of emissions in an efficient, effective, sufficiently fast and fair way towards climate neutrality, while not knowing how science, innovation, the economy, democracy, and legal systems, including case law, will develop. For instance, while on the one hand, there were fewer emissions from aviation in the first half of 2020 due to a dramatic external development,

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from the Commission to the European Parliament and the Council, Updated analysis of the non-CO_2 climate impacts of aviation and potential policy measures pursuant to EU Emissions Trading System Directive Article 30(4), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2020:277:FIN (accessed 27 January 2021).

[121] See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-f&chapter=27&clang=_en (accessed 3 December 2020). For a scholarly discussion, see Mark W. Roberts, 'Finishing the Job: The Montreal Protocol Moves to Phase Down Hydrofluorocarbons' (2017) 26(3) *RECIEL* 220–230.

[122] See for a concise explanation the information provided by UNEP: https://ozone.unep.org/treaties/montreal-protocol (accessed 3 December 2020) and also: Eric A. Heath, 'Introductory note to the amendment to the Montreal Protocol on substances that deplete the ozone layer (Kigali Amendment)' (2017) 56 *ILM* 193, DOI:10.1017/ilm.2016.2. The European Commission explains on its website that the emissions of such gases 'almost doubled from 1990 to 2014 – in contrast to emissions of all other greenhouse gases, which were reduced. However, thanks to EU legislation on fluorinated gases, F-gas emissions have been falling since 2015', at https://ec.europa.eu/clima/policies/f-gas_en (accessed 3 December 2020). The EEA has reported that 'Fluorinated greenhouse gas emissions have been decreasing in the EU since 2015, after 15 years of uninterrupted annual increases'; see EEA, 'Use of climate-warming fluorinated gases continues to drop across EU' (News, 1 December 2020, on file with authors). According to information provided by the then European Commission, the 'EU's F-gas emissions will be cut by two-thirds by 2030 compared with 2014 levels'; https://ec.europa.eu/clima/policies/f-gas/legislation_en (accessed 3 December 2020).

[123] In addition to already existing EU secondary legislation regulating these gases, such as, in particular, Regulation (EU) No. 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No. 842/2006. The aim is to reduce such emissions by at least 55% by 2030 compared with 2014 levels, see the new NDC for the EU from 17 December 2020, para. 23.

[124] See Article 1, referring to Annex V part 2 of the Energy Union and Climate Action Regulation. Not only HCFs, but also perfluorocarbons (PFCs) and sulphur hexafluoride (SF_6) are covered by the EU climate law. The UNFCCC excluded gases governed by the Montreal Protocol (see for instance its Article 4), but the Paris Agreement has no such provision. See on the complex reporting of greenhouse gases, UNFCCC, Methodological issues relating to fluorinated gases, https://unfccc.int/process-and-meetings/transparency-and-reporting/methods-for-climate-change-transparency/methodological-issues-relating-to-fluorinated-gases (accessed 3 December 2020).

COVID-19, the increase in electronic network-related emissions, including from networks such as 4G and 5G, needs consideration and action.[125]

The width of EU climate law also causes problems for understanding: as has been observed before, 'given its breadth, complexity, and dynamic nature, it is a huge challenge … to acquire a good overview, let alone develop a comprehensive and in-depth analysis' of current climate law.[126]

In order to contribute to further insights, the sections below will delve into a specific dimension of the EU climate rule package, which is to steer by means of financial laws, particularly by means of the Taxonomy Regulation adopted in 2020.[127]

2.3 Financial Laws: An as yet Underexplored Topic

An element of EU climate law still to be further examined concerns how governmental policies entail or influence investments that have an impact on the transition to a climate-neutral society. Lawyers perhaps intend to focus first and foremost on obligations that directly address polluting activities. However, the behaviour of companies, citizens and (institutional) investors such as pension funds can also be steered (or nudged) by law in a desired direction. In light of this, it would also be interesting to examine and understand how very different governmental actions, being on the one hand the direct imposition of obligations on greenhouse gas emitters, and, on the other hand, the regulation of financial market players, interact. This section aims to provide an introductory discussion of the role of financial laws adopted at EU level. Such discussion is needed in view of the Paris Agreement, which states that finance flows need to be consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.[128] To what extent this objective can be seen as entailing a specific obligation for each party to the Paris Agreement cannot yet be identified with certainty, but, nonetheless, is a fundamental guiding principle for the implementation of the convention. Further case law could provide clarity on the fact whether, in domestic orders, governments – and perhaps even private parties – can be held to account to implement such a principle. While the 'finance flow' principle as codified in the Paris Agreement is indeed not directly applicable to private

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[125] See for example, https://www.euractiv.com/section/energy/news/ericsson-5g-could-dramatically-increase-network-energy-consumption/.

[126] Peeters (n. 10), 137.

[127] We would like to stress that the further improvement of the instruments mentioned above of course needs further research too, but falls outside the scope of this chapter. Changes of the instruments are already foreseen, and the European Court of Auditors also plays a role in this respect; see for example, 'Special Report 18/2020: The EU's Emissions Trading System: free allocation of allowances needed better targeting', available at https://www.eca.europa.eu/sites/ep/en/Pages/DocItem.aspx?did=54392, and the related council conclusions from 17 December 2020, available at https://data.consilium.europa.eu/doc/document/ST-14198-2020-INIT/en/pdf.

[128] Paris Agreement, Art. 2(1)(c). See in this respect the conclusions from the European Council stating that 'As a general principle, all EU expenditure should be consistent with Paris Agreement objectives.' European Council conclusions from 17–21 July 2020 on the recovery plan and multiannual financial framework for 2021–2027 https://www.consilium.europa.eu/en/press/press-releases/2020/07/21/european-council-conclusions-17-21-july-2020/, p. 7 (A21). Note also that 'An effective methodology for monitoring climate-spending and its performance, including reporting and relevant measures in case of insufficient progress, should ensure that the next MFF as a whole contributes to the implementation of the Paris Agreement', conclusions p. 14 (para. 18).

investors in particular, it can still serve as contextual legal guidance that – in some jurisdictions, especially those that are very open to applying international law in domestic judicial decisions – could have influence on or even become part of judicial argumentation.[129] We say this with caution, since it is hard to predict how case law will develop; a first step would be that claimants point to this Article of the Paris Agreement.

Back to the European Union: the fact that the EU is based on – and has established – an internal market, including the free movement of (financial) services and capital,[130] and at the same time has ambitious climate policy goals, means that one can assume that the EU also tries to integrate climate concern into its market regulations. In essence, from a treaty perspective, the concern of climate change – being obviously an environmental concern – needs to be integrated into the Union's 'policies and activities'.[131] Moreover, in the Commission proposal for the EU Climate Law, provisions are included in order to reach consistency of Union measures with the climate neutrality objective. This includes the assessment, already discussed above, of 'any draft measure or legislative proposal in light of the climate-neutrality objective' which needs to be included in 'any impact assessment accompanying these measures or proposals'.[132] The proposed provision reads as a procedural measure, since it is not clearly stated that all Union acts have to contribute to the climate neutrality objective. Moreover, the provision does not solve potential weighing problems either, for instance when climate measures would harm other environmental concerns, such as nature values.[133] Admittedly, it is hard to forecast and regulate the priority that should be given to climate-related measures above other values, such

[129] We are not aware – and did not examine comprehensively – whether the argument has been brought in specific cases in jurisdictions across the world. See for an example of litigation (in the UK) on how the government (the central bank) invests: *R (on the application of People & Planet) v HM Treasury*, addressing the policy adopted by HM Treasury for handling its investment in Royal Bank of Scotland (RBS) – with an argument that RBS provided financial support for many projects which had a detrimental effect on both climate change and human rights. The case is available at http://climatecasechart.com/non-us-case/r-on-the-application-of-people-planet-v-hm-treasury/ and was decided in 2009, so before the conclusion of the Paris Agreement. Although the claim failed, it did get a lot of public attention (Master's thesis, Kate Smethills, Maastricht University 2019–2020, p. 24, available upon request); and 'In 2018, nine years since the claim was brought, RBS made a public announcement that it had officially ended all financial support for projects that had a detrimental effect on climate change and human rights as part of its investment policy.'

[130] TEU Article 3(3) states that the internal market 'shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.' See further on free movement, TFEU Art. 26.

[131] TFEU Art. 11.

[132] Commission proposal, Article 5(4), discussed in section 2.3. At the time of writing it is not clear how the provision will be designed, particularly in connection to the trajectory that the Commission proposes. Interestingly, the provision does not exclude draft implementing or delegated acts.

[133] This is a challenge yet to be further examined by legal scholarship. It is to be recalled that according to the TEU and TFEU, a high level of environmental protection has to be adhered to; however, this general objective does not solve the weighing issue, particular where it concerns intra-environmental conflicts such as the establishment of wind energy versus protection of nature. Furthermore, climate and other environmental values, such as biodiversity, must not be opposed to one another, nor be approached as static elements, as they are all part of the same dynamic system. The UNFCCC defines the 'climate system as the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions' (Article 1).

as other environmental values including preserving biodiversity, and also other concerns such as economic circumstances. After all, Article 11 TFEU, regulating the external integration principle, points at 'sustainable development', which traditionally entails a weighing of different values and concerns.

To 'facilitate and stimulate the public and private investments needed for the transition to a climate-neutral, green, competitive and inclusive economy', but also to provide public funding, the EU has taken, or is trying to take, several measures.[134] The European Council pointed at prioritising climate change in EU budgets, in the following way (where MFF stands for Multiannual Financial Framework and NGEU for New Generation EU):

> Climate action will be mainstreamed in policies and programmes financed under the MFF and NGEU. An overall climate target of 30% will apply to the total amount of expenditure from the MFF and NGEU and be reflected in appropriate targets in sectoral legislation.[135] They shall comply with the objective of EU climate neutrality by 2050 and contribute to achieving the Union's new 2030 climate targets, which will be updated by the end of the year. As a general principle, all EU expenditure should be consistent with Paris Agreement objectives.[136]

As well as actions that involve public money, including the Just Transition Mechanism and a Just Transition Fund aiming to address social and economic consequences related to the transition to a climate-neutral society,[137] the financial activities of the private sector are also subjected to regulation. This illustrates the policy aim of the Union to 'fully exploit the potential of the internal market to achieve' sustainable development.[138]

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[134] See, for a coherent explanation, including the mobilisation of public funding, information provided by the EU, for example, the European Council conclusions from 17–21 July 2020 on the recovery plan and multiannual financial framework for 2021–2027 https://www.consilium.europa.eu/en/press/press-releases/2020/07/21/european-council-conclusions-17-21-july-2020/ and, earlier, the website from the European Commission https://ec.europa.eu/regional_policy/en/newsroom/news/2020/01/14-01-2020-financing-the-green-transition-the-european-green-deal-investment-plan-and-just-transition-mechanism (accessed 2 August 2020).

[135] Earlier, Regulation (EU) 2015/1017 of the European Parliament and of the Council specified a 40% climate investment target for infrastructure and innovation projects under the European Fund for Strategic Investment, see preamble, para. 17, of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ EU L 198/13.

[136] European Council Conclusions from 17–21 July 2020 on the recovery plan and multiannual financial framework for 2021–2027, p. 7 (A21).

[137] More information is given on the website from the European Commission, for instance, https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_24 (accessed 4 August 2020), and see also about InvestEU, https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan-europe-juncker-plan/whats-next-investeu-programme-2021-2027_en (accessed 4 August 2020).

[138] As stated in the preamble, para. 9, of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ EU L 198/13.

2.4 The Taxonomy Regulation: Aiming to Provide Clarity on 'Environmentally Sustainable' Investments

A new EU regulation, the so-called *Taxonomy Regulation* (entered into force in 2020),[139] aims to stimulate sustainable investment by market actors.[140] This Regulation is of a facilitative nature since it aims to provide clarity to the market with regard to the possibility of calling investments sustainable. This is done by introducing a classification system (a taxonomy) that aims to avoid 'greenwashing' (meaning that activities are called environmentally friendly while in practice they are not sufficiently green).[141] In its preamble, the Regulation refers to article 2(1)(c) of the Paris Agreement (to make financial flows consistent with the climate objectives) and the Regulation is even said to be '*a key step* towards the objective of achieving a climate-neutral Union by 2050' (emphasis added).[142] Furthermore, the EU legislator expects that providing a classification system for sustainable investments may lure market participants not covered by the Regulation to publish information on the sustainability of their activities voluntarily.[143] From a legal perspective, it needs to be observed that legal action against 'false' or greenwashing information may be hard to take, but is not impossible.[144] The Aarhus Convention has not yet provided detailed and result-oriented provisions with regard to how to regulate environmental information disclosure by private actors, since its Article 5(6) only states that 'Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.'[145] The Taxonomy Regulation moves beyond this provision and introduces hard law for the possibility for market actors covered by the Regulation to call investments environmentally sustainable.[146]

Importantly, the Regulation concerns 'environmentally sustainable economic activities', which illustrates that the environmental dimension of the concept of sustainable development

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[139] We are grateful to Gabrielė Vilemo Gotkovič, who wrote a paper on 'EU Sustainable Finance Regulation & Institutional Investors' in the academic year 2019–2020 at Maastricht University and, in this way, introduced us to this specific field of law. The paper contains an excellent introduction and discussion of EU sustainable finance regulation.

[140] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ EU L 198/13 (published 22 June 2020; see for its entry into force Article 27). See the preamble for the history of its development, including the work of a High-Level Expert Group.

[141] In words of the Regulation, 'a shared, holistic understanding of the environmental sustainability of activities and investments', preamble para. 6.

[142] Taxonomy Regulation, preamble para. 3.

[143] Taxonomy Regulation, preamble paras 15 and 22.

[144] This issue needs further research (including examining the issue mentioned in preamble para. 21). Possibly national committees (codes) assessing the trustworthiness of public advertisements can play a role.

[145] Of course, the Protocol on Pollutant Release and Transfer Register (PRTR protocol) provides important provisions on disclosing emissions information, but not in products or services.

[146] Article 1 of the Taxonomy Regulation sets the scope, including 'financial market participants that make available financial products' and 'undertakings which are subject to the obligation to publish a non-financial statement or a consolidated non-financial statement pursuant to Article 19a or Article 29a of Directive 2013/34/EU of the European Parliament and of the Council(68), respectively'.

is the objective of the Regulation.[147] This is important in view of the breadth, and, consequently, interpretation challenges of the term 'sustainable development'.[148] A variety of actors are under the obligation to disclose information so that the environmental sustainability of their activities can be understood.[149] Disclosure duties are aligned to other EU laws such as the Regulation on sustainability-related disclosures in the financial services sector.[150]

As is almost always the case, this Regulation requires further rule-making, and particularly the rules that specify environmental impacts can be very complex, detailed and in need of regular updates.[151] As a rule of thumb, 'An economic activity should not qualify as environmentally sustainable if it causes more harm to the environment than the benefits it brings' and for assessing this, the precautionary principle – by no means an easy principle to apply – is relevant, according to the EU legislator.[152] Enforcement will be the task of national authorities, which will hence have the challenge to understand and check compliance with complex criteria.[153]

The Commission is entrusted with the task of adopting further rules by means of delegated acts to set the criteria for what can be called environmentally sustainable investments.[154] This provision is critically described as the 'Commission becomes the power that will regulate

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[147] See, for instance, its Article 3; nonetheless, see Article 3(c) and preamble para. 35 explaining that minimum safeguards related to human and labour rights need to be complied with. Article 22 of the Taxonomy Regulation hints at including social objectives in the future.

[148] Gyula Bándi, 'Principles of EU Environmental Law Including (the Objective of) Sustainable Development' in Marjan Peeters and Mariolina Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) Chapter 2.

[149] Taxonomy Regulation; see for instance preamble para. 18 and Article 9. Six environmental objectives have been selected, which are: climate change mitigation; climate change adaptation; the sustainable use and protection of water and marine resources; the transition to a circular economy; pollution prevention and control; and the protection and restoration of biodiversity and ecosystems (para. 23). Obligations to disclose information can be found for instance in Articles 5, 6 and 8.

[150] Taxonomy Regulation, preamble para. 19, referring to Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (OJ L 317, 9.12.2019, p. 1); see also Articles 5, 6 and 7 of the Taxonomy Regulation.

[151] See in a nutshell the Taxonomy Regulation, preamble para. 38.

[152] Taxonomy Regulation, preamble para. 40 and Article 19(1)(f). See for the legal definition of 'environmentally sustainable economic activities' Article 3. See also Article 16.

[153] Taxonomy Regulation, preamble para. 18 and para. 55 (with reference to aligning the enforcement with other EU Regulations) and Articles 21 and 22. See also the following statement of awareness:

> To avoid overly burdensome compliance costs on economic operators, the Commission should establish technical screening criteria that provide for sufficient legal clarity, that are practicable and easy to apply, and for which compliance can be verified within reasonable cost-of-compliance boundaries, thereby avoiding unnecessary administrative burden. Technical screening criteria could require carrying out a life-cycle assessment where sufficiently practicable and where necessary.

Taxonomy Regulation, preamble para. 47. Obviously, the intended avoidance of overly burdensome compliance costs will also have benefits for the enforcement authorities.

[154] See, on the delegation of rule-making power to the European Commission, para. 54 and Article 22 of the Taxonomy Regulation. See for a critical comment highlighting opacity, imprecision and subjectivity: Daniel Guéguen, 'The EU's green finance taxonomy: an Orwellian mechanism' (published on Euractive: https://www.euractiv.com/section/energy-environment/opinion/the-eus-green-finance-taxonomy-an-orwellian-mechanism/) 20 November 2020 (accessed 3 December 2020). Delegated acts are made possible by Article 290 TFEU and are already discussed above in the context of the EU climate

issues of vital importance'.[155] Nonetheless, the Regulation provides some criteria that the Commission of course has to adhere to, such as a kind of special treatment for 'economic activities and sectors for which there are no technologically and economically feasible low-carbon alternatives'.[156] Such activities can still be qualified as

> contributing substantially to climate change mitigation if their greenhouse gas emissions are substantially lower than the sector or industry average, they do not hamper the development and deployment of low-carbon alternatives and they do not lead to a lock-in of assets incompatible with the objective of climate neutrality, considering the economic lifetime of those assets.[157]

Since such activities are often also regulated by other EU climate law, such as the EU ETS (for instance with regard to the cement or steel industry, and, clearly, aviation emissions),[158] one may expect that compliance with such law may also be relevant to qualifying as 'sustainable'.[159] However, the Regulation does not make any explicit cross-reference to the EU ETS Directive, while many other environmental Directives are referred to.

But, taking the narrower focus of financial laws, the Taxonomy Regulation is already difficult to understand in terms of its relationships with other such laws. For instance, the disclosure obligations of the Taxonomy Regulation 'supplement the rules on sustainability-related disclosures' laid down in another Regulation on sustainability-related disclosures in the financial services sector which will apply from 10 March 2021.[160] This law provides 'additional disclosure requirements to the existing elements of [five] relevant sectoral legislations … via a self-standing text (lex specialis) providing full harmonisation, cross-sectoral consistency and regulatory neutrality'.[161]

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law proposal. Guéguen highlights serious issues with the procedure of the adoption of the delegated act with criteria for the climate-related taxonomy.

[155] Daniel Guéguen (n. 154). See, for a kind of expert committee (the 'Platform sustainable finance', being an advisory body) involved in this Commission decision-making, https://ec.europa.eu/info/publications/sustainable-finance-platform_en (accessed 4 December 2020).

[156] Taxonomy Regulation, preamble para. 41 (quotes derived from this para.) and Article 10.

[157] See n. 155.

[158] We did not, however, check the exact coverage of the Regulation: it does not apply to aviation (and industrial) emissions directly, but may apply, we assume, to investments in such sectors. One interesting issue is the coverage by the Regulation of financial products: is trade in EU ETS allowances covered? See Article 1(2)(b) of the Regulation. And what about trade in (voluntary) offsets generated by forestry? Such issues need further exploration and research.

[159] Article 10(2), providing a special arrangement for activities without technologically and economically feasible low carbon alternatives (will the cost of allowances play a role here?), puts forward that the activity 'has greenhouse gas emission levels that correspond to the best performance in the sector or industry'. However, see also Article 17 ('where that activity leads to significant greenhouse gas emissions'): the joint interpretation of Articles 10 and 17 needs further consideration.

[160] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

[161] Explanation provided by the European Commission, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/sustainability-related-disclosure-financial-services-sector_en (accessed 3 December 2020). The European Commission only mentions the abbreviations of these five sectoral laws: AIFMD, UCITS, Solvency II, IDD and MiFID II.

The aim of this discussion of the Taxonomy Regulation is not to provide a detailed insight into its content, or its relationship to other laws,[162] but to flag that, as well as the hard law approaches discussed in section 3.2 above, and the governance approach undertaken by the Governance Regulation, to be complemented by the proposed EU Climate Law, other measures are taken that are also worthwhile to examine. One important issue is how effective will such a financial approach be towards reaching a sufficiently fast decrease of emissions, and, ultimately, climate neutrality? How will this body of law interact with or complement with hard core climate law instruments, such as emissions standards for cars and the EU ETS for industries and aviation? Besides this, there is also an important EU institutional law perspective: how is the balance of powers arranged between, on the one hand, the ordinary EU law-maker, and, on the other hand, the Commission as the sole institute entrusted with delegated and implementing powers? In that respect, and taken from a more societal perspective, how will society react to the increase of power at EU level, particularly in respect of the Commission, and will this result in more support for the EU or lead to an increase in resistance?[163] What kind of EU action will be appreciated more in the national spheres; will it be the market approaches aiming to provide more clarity on what can be seen as environmentally friendly? Will the EU citizens be proud to be part of the journey to climate neutrality by a European Union predominantly using market forces – thereby trying to let the market work for sustainability? Anyway, for future legal research, it is clear that the thoroughness of the approach towards climate neutrality in the next decades should not only be assessed by scrutinising the performance of individual Member States – as orchestrated under the Governance Regulation – but also the performance of EU institutions, in particular the Commission being entrusted with important powers. One of the challenges is how the decision-making of the Commission will be perceived as doing the right thing. The technical and complex characteristics of the decisions are, however, a barrier in this respect.[164]

Nonetheless, and on a more positive note, the potential role the Taxonomy Regulation can play outside EU territory also needs further examination. Since the Taxonomy Regulation applies to large undertakings,[165] requiring them to disclose inter alia 'the proportion of their turnover derived from products or services associated with economic activities that qualify as environmentally sustainable' the Regulation has – we assume – at least some reach outside EU

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[162] See, for an overview of sustainable finance laws (initiatives), Commission legislative proposals on sustainable finance https://ec.europa.eu/info/publications/180524-proposal-sustainable-finance_en (accessed 4 December 2020).

[163] See, in this respect, earlier observations as to how citizens might perceive the increased EU powers with the EU ETS: Marjan Peeters, 'Legislative Choices and Legal Values: Considerations on the Further Design of the European Greenhouse Gas Emissions Trading Scheme from a Viewpoint of Democratic Accountability' in M. G. Faure and M. Peeters (eds), *Climate Change and European Emissions Trading: Lessons for Theory and Practice* (Edward Elgar Publishing 2008), 17–52.

[164] See, as a randomly picked illustrative example, the following citizen comment: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12501-Emise-CO2-z-vozidel-Monitorov-n-a-zku-ebn-postupy-pro-osobn-automobily-a-dod-vky-aktualizace-/F541625 (regarding the consultation by the Commission for its decision on CO_2 vehicle emissions – monitoring and test procedures for cars and vans).

[165] Article 8 of the Taxonomy Regulation refers to undertakings covered by Directive 2014/95/EU amending 2013/34/EU on financial reporting.

territory.[166] Further research can delve into the question of how the EU taxonomy approach relates to already existing voluntary approaches for qualifying and disclosing environmental information, and whether the EU has some global influence on what is to be perceived as sustainable investment in view of the needed climate transition.

In conclusion, the financial streams established in the EU also matter with regard to the climate transition, but the legal dimensions have yet to be further examined. The political agreement reached between the European Parliament and the Council on the Recovery and Resilience Facility (RRF) makes a gigantic sum of money available for loans and grants (€672.5 billion), and, notably, at least 37% thereof, being part of national recovery and resilience plans, should support climate objectives.[167] It will be interesting to see how all the different initiatives, including the Taxonomy Regulation focusing on private investments, will contribute to implementing the 2050 objective of climate neutrality.

3 CLIMATE LITIGATION IN THE EU

3.1 Litigation in the Context of Already Adopted EU Climate Laws

Next to adopted EU climate laws, another important force on the European continent stems from recent climate litigation on greenhouse gas reductions to be accomplished by governments, either at national level or at EU level. Obviously, climate litigation can cover many different issues and, for instance, with regard to the EU ETS but also the Renewable Energy Directive, many CJEU decisions have been laid down, but in this section we focus on the trend of taking governments, including EU institutions, to court, either to urge more ambitious mitigation action through the courts or to demand compliance with earlier reduction goals – set at either EU or national level.[168] The litigation demanding more ambitious governmental policies is remarkable in light of the fact that the EU has already adopted relatively ambitious climate laws, particularly compared to other regions in the world.[169] Meanwhile, given the policy (and legislative) developments to adopt a stronger interim target for 2030 and to codify the 2050 climate neutrality objective, it can be expected that *litigation demanding governments to ensure compliance with the set goals* will be one of the important trends in the next decades. However, litigation can also take place to demand even stronger targets than are already being considered for 2030 and 2050, as we will see below.

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[166] The scope and potential external influence of the Taxonomy Regulation deserve further investigation. See for an indication of the *limited scope*: communication to the Dutch Parliament from 15.01.2021 (2020–2021 Kamerstuk 35570-IX, nr. 42, Tweede Kamer der Staten-Generaal: Het Groene Label, Atradius Dutch State Business, Versie december 2020, p. 7).

[167] Commission welcomes political agreement on Recovery and Resilience Facility, at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2397 (accessed 24 December 2020).

[168] This section will focus on litigation against governments and will be discussed from an EU law perspective. Other important litigation, particularly claims from private actors (particularly NGOs and/or individuals) against emitters fall outside the scope of this section. It will be interesting, however, to examine how public law requirements will impact the litigation against emitters (will they be forced to do more than is already regulated by public law?).

[169] Although the UK has, as a single country, submitted a target of 68% emission reduction by 2030 (see section 2).

3.2 Litigating the Target for 2030 at EU Level

At EU level, an action urging *more stringent* EU climate legislation has been brought to the CJEU by a group of ten families, some living in the EU but others living outside Europe (Kenya and Fiji), together with an association governed by Swedish law, which represents young indigenous Sami (the *Carvalho* case).[170] The application was made before the setting of the 2050 target and the strengthening of the 2030 target were proposed, and hence it focuses on attacking the 40% target for 2030. *Locus standi* is at the heart of this case, seeking the annulment of a broad EU legislative package, dedicated to greenhouse gas emissions, for its insufficient ambition. In short, the claimants argue that the technical and economic capacity of the European Union extends to reducing those emissions much more than has been legislated for in respect of emissions reductions by 2030 (being 40% emissions reduction). The claimants ask for an order to reduce emissions by at least 50 to 60%, or by such higher level of reduction as the Court shall deem appropriate.[171] Given the fact that the EU is most likely moving to codify the target of 55% reduction in 2030, as has been discussed in the previous sections, the claim is still more ambitious than the current political will at EU level. However, it is uncertain whether the case will expand on substance, as, in an order of 8 May 2019, the General Court dismissed the action as being inadmissible – which order has been appealed. Reasserting the long-standing *Plaumann doctrine*,[172] the General Court observed that

> it is true that every individual is likely to be affected one way or another by climate change, that issue being recognised by the European Union and the Member States who have, as a result, committed to reducing emissions. However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application.[173]

An alternative means for citizens to try to realise more ambitious action – if that is not possible through the CJEU with its (often) marginal control of the legality of EU secondary law – would be to consider an European Citizens' Initiative.[174] Article 11 TEU states that

> not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

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[170] T-330/18, *Armando Carvalho v European Parliament and Council*, 8 May 2019, ECLI:EU:T:2019:324. See, for a discussion (by a scholar involved in the case), Gerd Winter, '*Armando Carvalho and Others v. EU*: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9(1) *Transnational Environmental Law* 137–164.

[171] Case T-330/18, para. 18.

[172] Judgments of 15 July 1963, *Plaumann v Commission*, 25/62, EU:C:1963:17, p. 223; of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 72; of 27 February 2014, *Stichting Woonpunt and Others v Commission*, C-132/12 P, EU:C:2014:100, paragraph 57; and of 27 February 2014, *Stichting Woonlinie and Others v Commission*, C-133/12 P, EU:C:2014:105, paragraph 44.

[173] Case T-330/18, para. 50.

[174] See Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens' Initiative, and Articles 11 TEU and 24 TFEU.

For legal scholarship, it would be interesting to examine why addressing the courts is seemingly more popular than using such a democratic instrument – the latter also being surrounded with complexities and barriers.[175]

One of the important debates in EU environmental law scholarship focuses on the issue whether standing criteria for the CJEU should be relaxed;[176] in addition to this, legal scholarship should also examine whether other tools, such as the European Citizens' Initiative, are useful instruments to accommodate concerns from citizens regarding important issues such as EU action with regard to climate change.[177] This is essentially a choice between using upstream or downstream channels, the one having the potential to activate the democratic process, the other testing the limits of judicial control. Of course, the *complementary* functions of both channels are important to consider in this respect.

An appeal is now pending in the *Carvalho* case, on the grounds that the General Court erred in 'not adapting the Plaumann test in light of the compelling challenge of climate change and the foundation of the appellants' case in their individual fundamental rights, including a guarantee of effective legal protection of those rights'.[178] Even if the standing hurdle can be overcome, it is yet very uncertain that the CJEU would intervene in the legislative decision regarding the level of reduction of ambition.[179] New jurisprudential developments are of course not excluded, particularly regarding the exceptional and dramatic problem of climate change, and perhaps the CJEU – if overcoming the standing requirements – would be willing

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[175] We are grateful to Julia Hönnecke who developed at Maastricht University a Bachelor's thesis examining the development of European Citizen Initiatives in the field of climate change, showing that there has yet been no research on this specific item. To the best of our knowledge, environmental law literature has indeed hardly addressed this tool in the context of improving EU climate laws.

[176] See, among many other publications, Matthijs van Wolferen and Mariolina Eliantonio, 'Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-Compliance with the Aarhus Convention' in Marjan Peeters and Mariolina Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 148–163. On the role of the preliminary ruling as a way to bypass standing issues, see S. Röttger-Wirtz, 'Case C-616/17 *Blaise and Others*: The Precautionary Principle and its Role in Judicial Review – Glyphosate and the Regulatory Framework for Pesticides' (2020) 27(4) *Maastricht Journal of European and Comparative Law* 529–542.

[177] Perhaps legal scholars have more belief in litigation since they tend to find solutions through the discipline they are familiar with, see Catriona McKinnon and Marie-Catherine Petersmann, 'Is Climate Change a Human Rights Violation?' in Mike Hulme (ed.), *Contemporary Climate Change Debates* (Earthscan 2020) 168, with this quote from Koskenniemi: 'lawyers are enchanted by the law that is familiar to them and the institutions and practices they are involved with; that makes them often unable to find a good solution to the problem they are faced with'. Are EU environment law scholars generally more familiar with litigation than with relatively new democratic instruments such as the European Citizens' Initiative?

[178] Appeal brought on 23 July 2019 by Armando Carvalho and Others against the order of the General Court (Second Chamber) delivered on 8 May 2019 in Case T-330/18: *Carvalho and Others v Parliament and Council*; Case C-565/19 P.

[179] See for a discussion of CJEU case law thus far (so before the *Carvalho* case): Delphine Misonne, 'The Importance of Setting a Target: The EU Ambition of a High Level of Protection' (2015) 4(1) *Transnational Environmental Law* 11–36. See for a discussion of new developments, including that the requirement to reach a certain level of ambition is legally relevant and judicially cognisable, as demonstrated by the CJEU's case law: Delphine Misonne and Nicolas de Sadeleer, 'Art. 37' in F. Picod, S.Van Drooghenbroeck and C. Riscallah (eds), *Charte des droits fondamentaux de l'Union européenne* (Bruylant 2020) 921–950; Alicja Sikora, 'The Principle of a High Level of Protection as a Source of Enforceable Rights' (2016) 1 *Cahiers de droit européen* 399–418.

to perform an 'informational catalyst' role: asking the EU legislator for a reconsideration of the target, thereby taking into account the scientific basis for setting the target, but not ordering a precise target itself.[180]

However, it remains to be seen whether the EU legislator would be urged to take its highest possible ambition, in the light of the conditions laid down in the Paris Agreement,[181] which would break new ground.[182] One of the yet unknown features is whether, and if so, how, the Paris Agreement will play a major role, although it is already confirmed by the CJEU that international agreements prevail over acts laid down by European Union institutions.[183] Importantly, Article 193 TFEU gives, in principle, possibilities for Member States to adopt more stringent approaches compared to an EU environmental act.[184] It will be interesting to see whether, at the national level, such more-stringent climate actions will be (or are already) undertaken, or can even be compelled through national courts.[185] Most likely, one of the impor-

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[180] See in a more general way, not focusing on climate change: J. Scott and S. Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2007) 13(3) *Columbia Journal of European Law* 565–594. See more specifically related to climate change, see the following starting point formulated by a German Court: 'Measures must be based on careful analysis and justifiable assumptions. The state must, for instance, consider scientific findings such as those published by the Intergovernmental Panel on Climate Change', as discussed by Thomas Schomerus, 'Climate Change Litigation: German Family Farmers and *Urgenda* – Similar Cases, Differing Judgments' (2020) 17 *Journal for European Environmental & Planning Law* 322–332, at 328. See furthermore about the importance of accepting that the EU legislature is the most important power – even in view of its shortcomings: Damian Chalmers, 'The Democratic Ambiguity of EU Law Making and Its Enemies' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 303–326. See, for different views on the role of courts in intervening with policymakers: Eloise Scotford, Marjan Peeters and Ellen Vos, 'Is Legal Adjudication Essential for Enforcing Ambitious Climate Change Policies?' in Mike Hulme (ed.), *Contemporary Climate Change Debates* (Earthscan 2020) 191–206.

[181] As already discussed in section 2, the Paris Agreement states that 'each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' (Art. 4.3). Thus far, EU law does not imply a legal objective to attain the highest possible ambition in environmental policies, which also explains the *raison d'être* of Article 193 TFEU as far as the environmental chapter is concerned.

[182] By contrast, for instance, to a dated CJEU case, not focused on exactly the same issue: *Bettati v Safety HiTech Srl* (1998) Court of Justice of the European Union, ECLI:EU:C:1998:353.

[183] See Case C-352/19P, *Région de Bruxelles Capitale v Commission*, para. 25, referring to earlier case, *Intertanko et al.*, C-308/06. International agreements cannot prevail over EU primary law. The interpretation of the specific provisions of the Paris Agreement will be crucial. See, for a discussion, among many others: Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) *Review of European Community & International Environmental Law* 142–150 .

[184] See for a recent discussion of Article 193 TFEU: Leonie Reins, 'Where Eagles Dare: How Much Further May EU Member States Go under Article 193 TFEU?' in Marjan Peeters and Mariolina Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) 22–35. Also L. Squintani, *Beyond Harmonisation* (Cambridge University Press 2019).

[185] In light of Article 193 TFEU, including specific possibilities in secondary legislation for Member States to move to more stringent protection (and avoiding the so-called waterbed effect) would prevent legal uncertainty on how to interpret Article 193 TFEU. However, the dilemma is how to regulate that in view of the starting point of a collective effort for an EU-wide reduction target. Of course, the legal base of the contested acts and the (related) possibility left to Member States to adopt more ambition is a decisive aspect, together with the possible embedding with health issues (see in this respect, but not specifically on climate change and not on national discretion, but as an example of how the precaution-

tant debates in EU climate law will be to what extent and how Member States can use Article 193 TFEU (or even, more daringly, Article 194 TFEU?) to move to more ambitious climate action compared to EU climate legislation, or whether they can even be forced by the national courts to apply more stringent emission reductions compared to EU law,[186] including eventually becoming climate neutral within their own territory. This shifts the focus to litigation in EU Member States, which will be discussed in the next section.

3.3 Litigation at Member State Level

Climate litigation on greenhouse gases reductions to be accomplished by governments has emerged in several EU Member States, but gaining a thorough understanding of it is truly a challenge. While important decisions have been laid down by courts in, for example, France, Germany, Ireland and the Netherlands, it falls beyond the scope of this chapter to provide an in-depth and comparative analysis (see Chapter 13). Legal research starts examining and compare the different cases in national orders thoroughly,[187] taking the different national circumstances and judicial systems into account, in order to identify the reasons for judicial intervention, or lack thereof. [188] Authors have already illustrated that case law on seemingly the same matter in different jurisdictions differs remarkably,[189] while also showing unusual features.[190] Thus far, the claims asking for compliance with set EU or national law targets, or even asking for more ambitious action compared to EU law, have not yet induced national judges to submit preliminary questions to the CJEU which could provide some unity in judicial reasoning concerning EU climate law as the framework for national action.[191]

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ary principle plays a role in case of uncertain risks for human health: C-616/17, *Blaise*, 2019, Grand Chamber, para. 42 and para. 52: 'judicial review by the Court must necessarily be limited to whether the EU legislature … committed a manifest error of assessment'.

[186] This has already been decided in the *Urgenda* case, to be discussed below. The issue of how to interpret Article 193 TFEU in this respect has not been submitted to the CJEU. See for the Supreme Court decision and its considerations on Article 193 TFEU ecli:NL:HR:2019:2007; for the official English translation, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007.

[187] See, for example, Christel Cournil, *Les grandes affaires climatiques* (DICE, Confluence des droits 2020) Vol. 10, available at https://dice.univ-amu.fr/fr/dice/dice/publications/confluence-droits/ouvrages #numero10.

[188] The timing also matters when examining the various cases: the *Urgenda* case was initiated at a time, in 2012, where the future of international law on climate change was most uncertain. The first instance judicial decision dates from before the conclusion of the Paris Agreement and at a time where EU law on climate and energy was very different. The legal context changed from the end of 2016 onwards, with the entry into force of the Paris Agreement, and with the expansion of EU law in order to implement the Paris Agreement, as discussed in sections 2–3 of this chapter.

[189] Christel Cournil (n. 187); see also, for example, Thomas Schomerus, 'Climate Change Litigation: German *Family Farmers* and *Urgenda* – Similar Cases, Differing Judgments' (2020) 17 *Journal for European Environmental & Planning Law* 322–332.

[190] Such unusual features concern, for example, communication tools, argumentation, nature and number of plaintiffs. See D. Misonne, 'Renforcer l'ambition de l'Etat global dans un régime fédéral?' in C. Cournil (ed.), *Les procès climatiques* (Pedone 2018), 149–164.

[191] The Berlin administrative court gave a specific explanation for not submitting a preliminary question since the Effort Sharing Decision provided, in its view, sufficient clarity: Verwaltungsgericht Berlin, 31.10.2019 – 10 K 412.18. The full text is available at http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/17yp/bs/10/page/sammlung.psml?doc.hl=1&doc.id=JURE190015283&documentnumber=3&numberofresults=172&doctyp=jurisr&showdoccase=1&doc.part=L&

As already observed above, and depending on the development of EU climate legislation, one important trend of EU climate law jurisprudence will most likely be actions for compliance with EU climate law. Already illustrative of this is a judgment of the French Conseil d'État of 19 November 2020,[192] in which the higher French administrative jurisdiction, in order to be able to decide later on the substance of the case, asked more information from the French state as to how it truly intends to meet the trajectory already imposed by virtue of a French Decree of April 2020 on the national carbon budget, as related to the application of the EU 2018 Effort Sharing Regulation imposing a linear decrease of emissions – a requirement France is suspected of circumventing as it postponed it to a later part of the mitigation effort.[193]

For potential future litigation to enforce compliance with EU climate law, the conditions for accessing the national courts in order to address non-compliance by national governments are of course crucial. In other words, the implementation of Article 9(3) of the Aarhus Convention, in order to enable members of the public to address non-compliance with environmental law, including in particular obligations for Member States as provided for in EU climate law, is an important, but at the same time, sensitive issue for which no harmonising act has yet been adopted at EU level.[194] In light of this, the European Parliament has attempted to reinforce access to national courts so that civil society can hold national governments to account with regard to their climate action: it adopted an amendment to the proposed EU Climate Law containing a provision on this matter, although it is limited to public consultation requirements as stipulated in Article 10 of the Governance of the Energy Union and Climate Action Regulation.[195] Hence, EU law thus far lacks an access to national court provision that would enable civil society to enforce obligations for Member States, as stipulated in EU climate law,

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paramfromHL=true#focuspoint (accessed 28 December 2020). Also, in the several court decisions in the *Urgenda* case, no need to submit a preliminary question was recognised; see on this matter regarding the first instance decision, Marjan Peeters, 'Case Note *Urgenda Foundation and 886 Individuals vs The State of the Netherlands*: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25(1) *RECIEL* 123–129 and see, with regard to the Supreme Court decision, Chris Backes and Gerrit Van der Veen, '*Urgenda*: The Final Judgment of the Dutch Supreme Court' (2020) 17 *Journal for European Environmental & Planning Law* 307–321, stating inter alia that 'the court should have referred to the EU Court of Justice for a preliminary ruling on the validity of various EU law related norms', p. 316.

[192] Conseil d'État (France), Commune de Grande Synthe, 19 November 2020, nº 427301.

[193] Nicolas de Sadeleer, 'Le Conseil d'État de France condamne le report de la réduction des émissions de gaz à effet de serre par les autorités françaises', Justice en ligne, 8 January 2021, https://www.justice-en-ligne.be/le-Conseil-d-Etat-de-France. See https://www.conseil-etat.fr/actualites/actualites/emissions-de-gaz-a-effet-de-serre-le-gouvernement-doit-justifier-sous-3-mois-que-la-trajectoire-de-reduction-a-horizon-2030-pourra-etre-respectee. While the Conseil d'État insisted on the need for France to interpret its legislation with due regard to the Paris Agreement, which it considers to be devoid of direct effect, it still did not consider the possible legal implications of the Effort Sharing Regulation.

[194] Improving access to justice in environmental matters in the EU and its Member States, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 643 final, 14 October 2020.

[195] Amendments adopted by the European Parliament on 8 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD)); https://www.europarl.europa.eu/doceo/document/TA-9-2020-0253_EN.html:

(5a) the following Article is inserted:

'Article 11a Access to justice:

through the courts.[196] This seems an important gap since the proposed EU climate law includes a 'shall' obligation for Member States, 'the Member States shall take the necessary measures at … national level respectively, to enable the collective achievement of the climate-neutrality objective set out in paragraph 1, taking into account the importance of promoting fairness and solidarity among Member States'.[197] Since this 'shall' provision also contains vague terms (such as fairness and solidarity, and what would be the fair share of a Member State to the collective achievement?), it has yet to be seen whether courts would find it possible to derive specific obligations for Member States, which as such are not excluded depending on the specific circumstances.[198] At least, this possibility of judicial intervention seems to be in the mind of national politicians, at least in the Netherlands, where of course the specific *Urgenda* court decision was laid down: the Dutch government informed its parliament that measures that have a negative impact on the achievement of the objectives as codified in the European Climate Law can be enforced through the courts across the EU, which would lead to a level playing field.[199]

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1. Member States shall ensure that, in accordance with their national laws, members of the public concerned who have a sufficient interest or who claim the impairment of a right where administrative procedural law of a Member State requires such a right to be a precondition have access to a review procedure before a court of law or other independent and impartial body established by law with a view to challenging the substantive or procedural legality of decisions, acts or omissions subject to Article 10 of Regulation (EU) 2018/1999.
2. Member States shall determine the stage at which decisions, acts or omissions may be challenged.
3. Member States shall determine what constitutes a sufficient interest and impairment of a right, consistent with the objective of giving the public concerned wide access to justice. To that end, non-governmental organisation covered by the definition in Article 2(62a) shall be deemed as having a sufficient interest or having rights capable of being impaired for the purpose of paragraph 1 of this Article.
4. This Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.
5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

[196] Note that in the Dutch *Urgenda* case and in the German *Family Farmers* case the claims concerned policy targets, see the different judicial approaches in this respect in Schomerus (n. 188). For scholarly discussion it will be relevant to discuss to what extent policy targets stipulating a certain emission reduction should have legal effects (and hence, could be legally enforceable).

[197] Art. 2(2); please note that the EU would also have this 'shall' obligation; see the full text of this proposed provision.

[198] One should not forget that until 2030, specific emission reduction targets have been imposed on Member States for non-EU ETS emissions. National court procedures to enforce national governments to comply with those targets are not unthinkable. It remains to be seen, however, what the future is of this effort sharing approach after 2030: the Commission is even considering not continuing this approach: Commission Communication 'Stepping up Europe's 2030 climate ambition' COM(2020)562 of 17 September 2020. See about the fear that future EU climate law would become more soft: Chamon and Peeters (n. 68).

[199] In Dutch: 'dat nationale maatregelen die negatief werken ten aanzien van het bereiken van de bindende doelstellingen vastgelegd in de verordening kunnen worden aangevochten voor de (nationale) rechter. Hierdoor ontstaat een gelijker speelveld binnen de Unie'. Brief van de Minister van buitenlandse

Such a level playing field, to be achieved by judicial interventions, as considered by the Dutch government, is of course dependent on the implementation of Article 9(3) Aarhus Convention across EU Member States – an issue that indeed lacks harmonising legislation but on which strong CJEU jurisprudence has emerged, asking national courts to interpret Article 9(3) Aarhus Convention in a wide sense.[200] However, if Member States are governed by rather vague provisions in EU climate legislation – as in the example above – it will be interesting to see how the national courts will strike the delicate balance between democratically developed national climate policies (including those codified in national legislation) and judicial intervention.[201] Such national adjudication will of course also be influenced through future referrals for preliminary rulings, including referrals to clarify the provisions for the governance approach and the embedded discretion for Member States,[202] next to more familiar legality checks against EU law.[203]

Addressing courts to hold national governments to account, particularly by means of legality checks against EU law, will obviously be important in case of shortfalls in compliance of Member States with EU climate legislation. In this respect, we can only hope that going to court will not be needed, through Member States acting sufficiently ambitiously. Furthermore, we would not be surprised if the gigantic financial stream flowing through EU channels, stimulating the needed transition, would be an even greater force for change than law is, leading to more emission reductions than legally required.

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zaken aan de voorzitter van de Eerste Kamer der Staten-Generaal, 35 448 EU-voorstel: Voorstel voor een verordening van het Europees Parlement en de Raad tot vaststelling van een kader voor de totstandbrenging van klimaatneutraliteit en tot wijziging van Verordening (EU) 2018/1999 (Europese klimaatwet), Den Haag, 14 April 2020.

[200] *Brown Bear* case I (*Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, Case C-240/09):

> It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

[201] It would be even better, of course, if access to court were not necessary given, hopefully, sufficiently ambitious action by EU Member States.

[202] In a webinar lecture by one of the authors on this chapter, the (uncertain but not unthinkable) prospect of national courts giving some (indirect) legal weight to recommendations from the Commission made on the basis of the governance approach is mentioned (since Member States would need to take due account of them – see Article 6(3) of the Commission proposal; if that happened, the Commission would gain more power in this indirect way. This issue is yet to be examined in more depth. See 'The proposed EU climate law: towards climate neutrality in 2050' (online presentation), event organised by the Environmental Law Network International (ELNI), held on 23 June 2020; online webinar Event was hosted by Delphine Misonne, CEDRE, Université Saint-Louis Bruxelles, link to slides and video: https://www.youtube.com/watch?v=ZacGDZP_Q1k&feature=youtu.be.

[203] See J. Verschuuren (n. 95), 79.

3.4 Litigating against European Countries in Strasbourg

While the EU has developed, and is in the course of further developing, the package of EU climate legislation, all EU Member States are subject to a claim from six Portuguese young people (in age ranging from 8 to 21 years) submitted to the European Court of Human Rights, calling for deeper emission cuts.[204] The EU as such is not a party to the ECHR and cannot be brought before the Strasbourg Court.

The claim also addresses six other European states, being the UK, Switzerland, Norway, Russia, Turkey and Ukraine. With regard to the EU Member States, were the case to proceed on the merits, it would remain to be seen whether the fact that the EU has put in place climate laws applicable to them – with the chosen EU-wide reduction ambition of at least 40% by 2030 – would lead the Human Rights Court to find itself deferring to these legislative ambitions, or whether the Court would find a way to consider that (since this EU ambition is not the highest ambition possible) Member States should individually strengthen their approach.[205] In their application form, the claimants point inter alia at the need *for the EU* (and it is not clear whether this translates to each Member State individually) to move to 68%[206] emission reduction by 2030 in light of the 1.5 degrees objective – which is obviously much more than the 40%.[207] Meanwhile, the legislative development at EU level to codify the 2030 target (most likely 55% by 2030 given the political endorsement by the European Council from 11 December 2020) runs almost in parallel with this ECtHR procedure, and if the EU legislator codifies the new 2030 target faster than the judges in Strasbourg decide, it will be very interesting to see how the ECtHR would translate this *collective target* (not specified in individual Member States targets) in order to assess the *individual responsibility* of the EU Member States. All in all, it would be very surprising if the ECtHR did not defer to the strengthened legislative ambition of the EU legislator.

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[204] See about the claim and the claimants: https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/ (accessed 28 December 2020). See for more information: http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/ (accessed 5 May 2021).

[205] Obviously, this would then have to be considered as an Article 193 TFEU situation according to EU law. Nonetheless, according to Ole W. Pedersen, 'it is hard to imagine the ECtHR making findings similar to the Dutch Supreme Court in *Urgenda* when it comes to the specific details of emission reduction obligations'. Ole W. Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' 22 September 2020, https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/ (accessed 28 December 2020).

[206] Interestingly, the UK has submitted a target of exactly 68% in its first NDC (as mentioned in section 2.1).

[207] Page 26 of the annex to the application form, referring to statements from the UN Environment Programme. The application is available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_12109_complaint.pdf. Note that the European Parliament adopted a position to move to 60% in 2030 which is more ambitious than the 55% (see section 2.4) .

4 CONCLUSION: WHAT APPROACH (WORKS) TOWARDS 2050?

EU climate law is characterised by a continuous process of further expansion and deepening, particularly where it concerns laws focusing on reducing greenhouse gas emissions. While before the conclusion of the Paris Agreement in 2015, the EU climate law package was already impressive in terms of number and complexity, the current and planned legislative efforts at EU level to implement the Paris Agreement – and the ambition of the European Green Deal – complement and widen the EU climate law *acquis* enormously. It will be a tremendous challenge for everyone working with, or interested in, EU climate law to acquire a good understanding of all EU measures, and, notably, its implementation in EU Member States.

This chapter has provided a discussion of some core new elements of current EU climate law, particularly the emerging legal pathway towards climate neutrality to be achieved by 2050 and the establishment of financial approaches, such as the Taxonomy Regulation. Climate litigation is discussed in the light of this regulatory context. Since the ambition of the EU has increased, which can be illustrated by the process for stepping up the 2030 ambition, it would be logical to expect that future litigation strategies will focus on achieving compliance. Indeed, from a legal perspective, translating targets into concrete rules *and* compliance is the most important challenge for the next decades, particularly the current one up to 2030.

Indeed, at the time of writing, within a period of nine years, existing legislation has to be amended, and accelerated mitigation action needs to take place. Until 2030, the regulatory approach continues to mainly consist of hard law, with the EU ETS and the Effort Sharing Regulation as already long-standing pillars of the regulatory approach.[208] A basic characterisation of these regulatory approaches is that standards are set, but these are often provided with flexibilities to facilitate cost-effective compliance with those standards.

For the period after 2020, this typical market-based hard law approach is complemented by the LULUCF Regulation, which is an essential component when working with a net target, as the EU Commission is wanting to do for the intensified 2030 target.[209] From a legal perspective, one may, however, wonder whether such a compensatory approach – which includes emissions and removals from land use, land use change and forestry – is too complicated a concept, with a risk of misunderstandings or even fraud regarding the measurement and calculations of emissions and removals of emissions.[210] In other words, there is a risk that the EU will stretch its preference for providing flexibilities and cost-effectiveness too far, thereby

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[208] But other legislation is relevant too, such as the regulation of fluorinated greenhouse gases and car and van emissions.

[209] The outcome of the trilogue negotiations is not dealt with in this chapter: the European Parliament has a preference for not using a net target by 2030. The LULUCF approach is not discussed in this chapter but needs further research. Its complexity, including the need to understand land use and forestry, makes it difficult to examine from a legal perspective. See on LULUCF, Seita Romppanen, 'The EU Effort Sharing and LULUCF Regulations: The Complementary yet Crucial Components of the EU's Climate Policy beyond 2030' in Marjan Peeters and Mariolina Eliantonio, *Research Handbook on EU Environmental Law* (Edward Elgar Publishing 2020) Chapter 27.

[210] Or will new techniques provided by satellites help to ensure precise calculation? See Marjan Peeters, 'Only 29 years to go – The challenging path towards climate neutrality in 2050', Maastricht University Blog, 18 January 2021 https://www.maastrichtuniversity.nl/blog/2021/01/only-29-years-go-challenging-path-towards-climate-neutrality-2050.

bearing the risk of an unexecutable package of laws and non-compliance, or, even worse, fraud.

Meanwhile, a softer mode of regulation is also introduced by the Governance Regulation, based on plans to be developed by the Member States and to be assessed by the European Commission. This governance approach resembles the set-up of the Paris Agreement, although the EU governance approach has a more detailed legal framework with, for instance, ample consultation requirements. The effectiveness of this governance approach remains to be seen, including the extent to which the consultation practices turn out to be adequate approaches, and the question of what influence, even legal influence, the Commission recommendations may have.

The Taxonomy Regulation is a very new and again very different regulatory approach with which traditional environmental lawyers, often educated in, for example, environmental impact assessment laws, planning, and permissions for industrial installations, are usually not familiar. Its effectiveness is probably also harder to assess compared to traditional climate law, such as the setting of a cap (EU ETS) or a countrywide emission reduction standard (Effort Sharing).[211] One of the questions related to the Taxonomy Regulation is how it is possible to reflect the strengthening of overall reduction standards: the Taxonomy Regulation was adopted *before* the intensification of the 2030 target was endorsed by the European Council and submitted to the UNFCCC secretariat in the updated NDC on behalf of the EU and the Member States. Does the Regulation provide sufficient opportunity to align the criteria that qualify investments as being sustainable with the updated EU target? This is only one illustration of scholarly work that has yet to be carried out. The many legislative initiatives planned for 2021 will lead to a plethora of new questions, while progress is necessary to address the climate change problem. Moreover, there are also important questions to answer with regard to the Paris Agreement and its consequences for adjudication in the EU and national orders, such as the interpretation of what is to be understood by the 'highest possible ambition'.[212]

The conclusions above focus on EU secondary climate legislation. However, while discussing the evolving secondary EU climate law package is already demanding and important, we also have shed light in this chapter on the potential need for strengthening primary EU law, particularly with a view to the promotion of renewable energy. EU climate action has predominantly been imagined within the system of competences for secondary law, and the limits of this approach need further attention. However, for such steps, the political reality is crucial: in December 2020, the European Council gave a strong signal that a strengthening of the EU with respect to energy policies is not supported. In this situation, the main onus is on national decision-making for making sufficient energy transitions to become climate neutral. In other words: refusing further EU action makes the national orders, including obviously the national politicians, even more responsible. It will be interesting to see how climate litigation in the national orders will play a role in this respect.

Finally, only the future will tell us who has been shown to be a leader in the process towards climate neutrality. Will it be some EU Member States who decide to (and do) become climate neutral in their territory, even earlier than 2050? Or will it be a non-EU state, such as particularly the UK, having previously been a European leader by putting forward the national

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[211] Although checking compliance with the (monitoring and reporting) provisions under the EU ETS and Effort Sharing needs meticulous attention.

[212] Article 4(3) Paris Agreement.

2008 Climate Act? Or will the EU itself be the driving force, with its huge package of EU climate laws and a possible reinforced EU integration, not only making use of regulation but also of gigantic financial streams?[213] Or will the complexity of this EU climate law package, together with shortfalls in compliance and a further weakening of support from EU citizens for the EU as a whole, turn out to be the sobering future? No one can predict. The transition to a climate-neutral society – or European continent for that matter – is not an easy path; we have never walked it before.[214] We can only hope that for addressing the climate change problem, the rule-creating force of the European Union will be a driver for the whole continent, and beyond. What is important for legal research is to try to examine its successes and failures; both are important lessons, although the time frame for learning is only short.

POST SCRIPTUM (5 MAY 2021)

The chapter above is based on research up to 31 December 2020. However, in the first quarter of 2021 very important legal developments have already happened, such as the decision of the CJEU from 25 March 2021 to dismiss the appeal made by Carvalho and others, confirming the General Court's position on their lack of *locus standi*. In contrast with this decision, the German constitutional court – only one day before, on 24 March 2021 – found constitutional complaints against the Federal Climate Change Act partially successful. That judgment considers the concept of climate neutrality (in a national context) and contains important considerations on the need to better distribute the mitigation effort over time, in a way that respects fundamental rights: 'one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom' . Moreover, the negotiations by the EU legislative institutions on the EU climate law have resulted, on 21 April 2021, in a political agreement, and the European Commission has adopted – after fierce debates in civil society and an enormous number of comments from the public – a draft delegated act on taxonomy for climate change mitigation and climate change adaptation.

Such a dynamic development as has happened up to May 2021 is most likely illustrative of the future of EU climate law up to 2030 and beyond. Meanwhile, the current legislative package, which needs to be amended soon in order to be suitable to steer towards climate neutrality by at the latest 2050, is already very complex, and it will also be a challenge to examine the emerging climate case law, particularly at the national level (in many different languages …), as well as at the CJEU level. We hence hope that the coverage and discussion of EU climate law in this chapter, realised at the end of the second decennium, and 30 years before the deadline for climate neutrality lapses, is valuable for those who truly want to delve into an understanding of the strengths and weaknesses of EU climate law.

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[213] If legally acceptable: we did not assess the lawfulness of the new financial instruments established during the COVID-19 pandemic.

[214] As stated in Peeters (n. 209).

SECOND POST SCRIPTUM (19 MAY 2022)

The European Union legal framework has been completed by the 'European Climate Law' of 30 June 2021 (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')). On 14 July 2021, the European Commission launched a series of legislative proposals (including a revision of the ETS scheme and the Effort Sharing Regulation) and the adoption of these laws will be important not only for achieving climate neutrality by 2050 at the latest, but notably also the intermediate target of 2030 ('Fit-for-55').