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IV CEDR Mediterranean Forum

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Mediterranean Forum

Common Challenges: European Green Deal

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Preface

Dear Reader

The COVID 19 pandemic continues to grip us and dictate our agenda. Our traditional congress, planned for September 2021 in Cardiff, had to be postponed to next year. Numerous events of our national organisations were cancelled or held digitally or hybrid. A great success was the IV CEDR Regional Forum Mediterranian Europe in December last year, which was in the capable hands of the University of Seville. Many thanks to all those involved. Some of the contributions are collected in this issue for further reading. Have fun!

Roland Norer

Editorial Director

Chère lectrice, cher lecteur

La pandémie COVID 19 continue de nous saisir et de dicter notre agenda. Notre traditionnel congrès, prévu en septembre 2021 à Cardiff, a dû être reporté à l'année prochaine. De nombreux événements de nos organisations nationales ont été annulés ou organisés sous forme numérique ou hybride. Le IVe Forum régional du CEDR pour l'Europe méditerranéenne, qui s'est tenu en décembre de l'année dernière entre les mains de l'Université de Séville, a été un grand succès. Un grand merci à toutes les personnes impliquées. Certaines de ces contributions sont rassemblées dans ce numéro pour une lecture plus approfondie. Amusez-vous bien!

Roland Norer

Editorial Director

Sehr geehrte Leserinnen und Leser

Weiterhin hat uns die COVID-19-Pandemie im Griff und diktiert unsere Agenda. Unser traditioneller Kongress, geplant für September 2021 in Cardiff, musste aufs nächste Jahr verschoben werden. Zahlreiche Veranstaltungen unserer nationalen Organisationen wurden abgesagt oder digital bzw. hybrid durchgeführt. Ein großer Erfolg war dabei das IV CEDR Regional Forum Mediterranian Europe im Dezember letzten Jahres, das in den bewährten Händen der Universität Sevilla lag. Herzlicher Dank an alle Beteiligten. Einige der Beiträge sind in diesem Heft zum Nachlesen versammelt. Viel Spass!

Roland Norer

Editorial Director

President's Corner

Views of the President Geoff Whittaker

So far this year has not been one with the usual level of external activity for CEDR, but on the internal side we have not been idle. Our main work has, of course, been limited by the restrictions – not only legal and social but psychological also – imposed by the Covid-19 pandemic. Whilst I very much hope that the time approaches when we will be able to conduct our lives without thinking first of the negative features of the pandemic, it has undoubtedly changed the way in which we can work and the plans which we make for the future.

We had to decide earlier this year that it was not possible to hold our normal biennial Congress in 2021. Discussions continue about when and how we may hold this event which in our activities carries the most significance, but in the meanwhile we have had to adapt our administrative procedures to take into account what is now possible.

At a Special General Assembly in July, we agreed to amend our Statutes to provide for meetings to be validly convened and held both in a physical location as before or online (or in a combination of both) in order that our ability to conduct our business is not hampered by any restrictions on travelling.

By the same process, the terms of office of President, Delegate-General, Secretary-General and Treasurer-General were extended until the Ordinary General Assembly of 2022.

While much has been going on behind the scenes, other events have taken place, with online conferences held in various parts of Europe engaging in discussions on regular questions of mutual interest. The most recent was the V CEDR Mediterranean Forum, organised in Valladolid on 8 October.

Particular thanks are due to the First Vice-President of CEDR, Professor Dr. Esther Muñiz Espada, and her Scientific Committee, which put together the Forum's programme; also to Associate Professor Mariagrazia Alabrese of the University of Pisa, Dr. Ludivine Petetin of the University of Cardiff and Professor Dr. Asuncion Marín Velarde of the University of Sevilla, who between them chaired the three sessions during the day. The full programme of the event appears later in this Journal.

It is proposed to collate the materials of the Forum for publication in the next issue of the Journal before Christmas and if speakers who would like their materials to be published would kindly send them direct to the CEDR Delegate-General Professor Dr. Roland Norer of the University of Luzern (roland.norer@unilu.ch) that would be appreciated.

I would briefly mention a coming event which CEDR has traditionally attended, which is run by the German Federal Ministry of Food and Agriculture. The Global Forum for Food and Agriculture has been held annually in Berlin since 2009 and, due to the pandemic, was held in 2021 for the first time online. This availability will be repeated in 2022 from 24-28 January.

For those who have not before attended, the GFFA provides a fully international discussion of elements of current importance to the safe and secure production of food and environmental maintenance and, this year, will provide a continuation of the debate covered by our recent Mediterranean Forum. More information may be obtained from www.gffa-berlin.de/en/

In CEDR, we look forward to the opportunity once again to share your company – and a glass of something with which to lubricate it – at some physical location before much more time elapses. Meanwhile, stay safe, and keep yourselves and your families safe.

News

V CEDR Mediterranean Forum

8th October 2021, University of Valladolid (Spain)

Online
Dir. Esther Muñiz Espada, Universidad de Valladolid, España
(Language of conference: English, Spanish)

The challenge of the fight against food waste and agrifood chain: costs an results of the new sustainability policies, España 2050

Opening session

Antonio Largo Cabrerizo, Excellency and Magfco. Rector of the University of Valladolid

Paloma García Galán, Technical Secretary General of the Ministry of Agriculture, Fisheries and Food

José Miguel Herrero Velasco, Director General of Food Industry, Ministry of Agriculture, Fisheries and Food

Geoff Whittaker, President European Council for Rural Law (CEDR)

Rocio Perteguer Prieto, Director of the Environment, Consumers and Users of the Association of Registrars

First session. European Legal scheme on food waste and agrifood chain. Perspectives from different European Mediterranean countries

Chair: Maria Grazia Alabrese, Pisa University

Spain
Esther Muñiz Espada. University of Valladolid

France
Luc Bodiguel, University of Nantes

Italy
Irene Canfora, Bari University
Luigi Russo, Ferrara University

Portugal
Tiago Picão de Abreu, Lisboa

Second session. Perspectives from other European countries
Chair: Ludivine Petetin, Cardiff University

José Martinez, Göttingen University. *State failures in food policy - food wastage in Germany*

Aneta Suchon, Adam Mickiewicza University. *Sustainable agriculture in the European Green Deal - selected legal issues*

Monika Król, Lodzki University. *Climate impact on food security in context of food waste*

Paweł Wojciechowski, Warsaw University. *The food waste and the date of minimum durability – possible legal solution*

Anna Kapała, Wrocław University. *Legal aspects of local food systems*

Izabela Lipińska, Poznan University. *Waste in the food supply chain - selected legal issues*
K. Leśkiewicz, University of Poznan, Sustainable food systems - legal aspect

Łobos Kotowska, Katowice University. *The cultivation contract as an instrument of agricultural law preventing food overproduction*

Łukasz Sokolowski, Adam Mickiewicza University. *Some critical comments on the new polish Act on Counteracting Food Waste*

Katarzyna Leśkiewicz, Adam Mickiewicza University. *Sanctions for wasting food in the light of Polish regulations - selected aspects*

Krzysztof Różański, Adam Mickiewicza University. *Food waste regulations in Poland, with special reference to the situation in the beekeeping sector*

Third session. Nuevo régimen sobre cadena alimentaria y desperdicio alimentario Una visión desde España
Moderador: Asunción Marín, Universidad de Sevilla

José Abellán, Presidente Foro Agrario. *Desperdicio alimentario y desafios de la cadena alimentaria*

Leticia Bourges, SG CEDR. *Utilidad y contradicciones en la noción del desperdicio alimentario*

Angel Sánchez, Universidad de La Rioja. *Fin al agotamiento de las tierras y de las aguas: el desperdicio alimentario*

Benedetta Ubertazzi, Universidad Bicocca de Milán. *Desperdicio alimentario y patrimonio cultural inmaterial de la UNESCO*

María Jose Cazorla, Universidad de Almería. *La pérdida y desperdicio de alimentos hortícolas desde el campo a la mesa*

Pablo Amat, Universidad Politécnica de Valencia. *Integralidad en la cadena alimentaria*

Ana Carretero, Universidad de Castilla-La Mancha. *El papel de los canales cortos en la reducción del desperdicio alimentario y la generación de residuos*

Maria Paz de la Cuesta, Hague University. *Prácticas antidesperdicio en los supermercados y su repercusión en el resto de la cadena y en los proveedores*

Juan Carlos Gamazo, Universidad de Valladolid. *Una aproximación desde la economía circular al desperdicio alimentario*

Noemí Serrano, Universidad de Valladolid*. Excedente y desperdicio de alimentos como oportunidad para la creación de empleo. Las contribuciones al empleo de la estrategia "de la granja a la mesa"*

Closing session

Roland Norer, DG CEDR, University of Lucerne, Switzerland

Publications

Ackermann Jan, Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken (Forum Umwelt-, Agrar- und Klimaschutzrecht Band 18), Nomos 2020

Bays Vincent, Les surfaces d'assolement. Étude de droit de l'aménagement du territoire, Schulthess 2021

Dellapenna Joseph W./Gupta Joyeeta (ed.), Water Law, Elgar 2021

Ferraris Luchino, The Pursuit of Sustainable Agriculture in EU Free Trade Agreements, Wageningen Academic Publishers 2020

Georgopoulos Théodore, Global Wine Law, Helbing Lichtenhahn 2021

Norer Roland (Hrsg.), Smart Farming: Von Landechnik bis Big Data. Rechtsfragen einer digitalisierten Landwirtschaft. Tagungsband der 6. Luzerner Agrarrechtstage, Dike 2020

Seutemann Herbert, Landwirtschaftssachen – Ein Leitfaden für die erstinstanzliche Praxis vor dem Landwirtschaftsgericht, Agricola 2020

Van der Meulen Bernd/Wernaart Bart (Hrsg.), EU Food Law Handbook (European Institute for Food Law series, Volume 13), Wageningen Academic Publishers 2020

Wagner Erika/Ecker Daniela, Rechtlicher Schutz der biologischen Produktion vor unerlaubten Pflanzenschutzmitteleinträgen, Trauner 2021

Contractual autonomy and new green economy

Carlo Pilia
Prof. of civil law and rights protection, University of Cagliari (Italy)

1. Legal instruments for programming the new green economy

The first phase concerns the choice of the legal instruments for programming the new green economy.

The European Commission with the New Green Deal identifies ambitious climate goals (achieving climate neutrality) for the next few years (by 2050), under the banner of economic, social and environmental sustainability.

European policy intends to program interventions with a plurality of legal instruments (sources), which can essentially be distinguished according to whether they are authoritative or conventional.

The authoritative sources are mainly legislative sources, European and state, which impose in a binding way the objectives and the actions to be carried out, both on public administrations, businesses and citizens. Authoritative sources are an important lever, but not sufficient, because they are too rigid and limited in scope.

The Commission itself foresees a wide use of conventional instruments, both to coordinate the various European, national and regional public administrations and to develop more appropriate solutions to the various intervention contexts. We want to foster extensive collaboration and sharing both within the European Union and with other external institutions, the United Nations and non-EU states, with which to sign international agreements.

Moreover, the conventional instrument is also hypothesized to involve private stakeholders, to be included and encouraged in the transition processes to the new green economy.

Summary: internal and international, public and private agreements for the green economy are a second strategic lever for change that really wants to be shared and implemented by all, both those who are advantaged and those who may be affected by prejudices.

Agreements, therefore, are the tool for a transformation that is inclusive, an indispensable premise of the feasibility of the transformation objectives.

2. Legal instruments for implementing the new green economy

The second phase concerns the legal instruments for implementing the new green economy.

The objectives set in the legal sources need to be implemented in the various contexts, both by public administrations and by individuals, businesses and citizens.

Once again, European programs can be implemented coercively with administrative tools by European and national institutions. These implementation tools are important but not sufficient, as they have a limited scope for public intervention. It is also essential to involve private individuals, both for aspects concerning relations with the public administration and relations between private individuals.

Again, conventional tools are indispensable for the implementation of green economy actions.

On the one hand, think of public contracts which, for some time now, have provided for the inclusion of the so-called green clauses, which require companies to comply with sustainability standards. In the award of contracts according to the criterion of the most advantageous offer, rather than that of the maximum discount, the importance not only of the economic aspects, but also of those of social and environmental sustainability is highlighted.

Will green contractual clauses apply to all public administration contracts? Between public administrations and with businesses? In this way, all public contract schemes will be colored green, also on a legal level, giving priority to the achievement of green objectives.

The most difficult area of intervention is that of relationships between individuals, both the relationships between business chains and the relationships between businesses and consumers. In these cases, it is discussed which are the best mechanisms to use to have green contracts concluded between private individuals.

The law can intervene authoritatively, depending on the case, by prohibiting or imposing the conclusion of the contract and even the content of some clauses, respectively, black or green. The imposition, however, is based on external limits to the exercise of contractual autonomy, which is normally left to the dialectic of consents, which animates contractual and market freedom.

In this sense, on a voluntary basis, private individuals could conclude contracts with green clauses, but support is needed to guide these choices.

The document from the European Commission talks about allocating funds and granting financial incentives for transition, both for those who are advantaged and for those who can suffer harm.

Communication campaigns are also envisaged to raise awareness of the conclusion of green contracts, both for the supply chains of companies that want to qualify and for consumers who want to contribute to sustainable choices with their purchases, once again overcoming an exclusively economic approach. at least in the short term.

Summary: public and private contracts are the most effective tool for implementing green policies in the various sectors involved in the transformation processes. The conclusion of green contracts must be encouraged, as it must pass an assessment of short-term economic convenience. The contractual choice of businesses and citizens is essential to achieve the objectives of the new green economy.

3. Management of the conflict related to the transition to the green economy

The third phase concerns the management of the conflict related to the transition to the green economy.

The transition process, above all, if imposed with the tight deadlines indicated in the Commission's plan, will cause strong conflicts and serious conflicts. These are epochal changes that affect all economic sectors and involve significant shifts in the organization of production processes.

The Commission assumes the double lever of imposition and sharing, but the onset of conflicts is foreseeable that must be managed efficiently, in order to ensure the achievement of the objectives. In hypothesizing appropriate financing to support investments in the new green economy and for compensatory measures for the injured, once again, a consensual compositional path is indicated that tends to be inclusive.

The judicial, European or state authoritative resolution of conflicts is accompanied by an amicable settlement achieved through compositional and conciliatory agreements. This second path is to be preferred, not only because it is simpler and faster, but also because it allows to find shared solutions that guarantee economic and social cohesion.

In this sense, the conciliation and mediation mechanisms, which already have a common European discipline, can usefully be used also for the amicable resolution of conflicts linked to the green transition.

Without prejudice to the inalienability of the fundamental right to judicial protection, the use of out-of-court settlement solutions can be imposed by law, by the judge or agreed by the parties to the conflict. To facilitate the effective use of mediation, it is necessary to check whether to leave access left to the voluntary nature of the parties or whether to legally impose it.

Summary: the conciliatory agreement must be the main tool for resolving conflicts triggered by the implementation of green policy. Access to consensual resolution mechanisms must be encouraged because it is essential for inclusion.

4. Conclusions

To plan, implement and manage the policy of the new green economy, two levers are available, respectively, focused on the authoritative-taxing approach and the voluntary-sharing approach.

Since the approval of the European policy, therefore, it is necessary to make precise choices of authoritative or consensual sense, in identifying the legal sources, the implementation tools and the most appropriate compositional mechanisms.

The compulsory – voluntary alternative could be overcome through the assumption of social responsibility by institutions and administrations, in the public sphere, and by businesses and citizens / consumers, in the private sphere.

With the social responsibility for the realization of the new green economy, in fact, without being forced, institutions, administrations, businesses and citizens voluntarily undertake a binding commitment to achieve the objectives of the new green deal, because they are convinced of its usefulness in the interest general all and of the next generations.

Contractual autonomy, at different levels, is colored green and blue for a transition that overcomes a selfish and patrimonial approach typical of the civil law tradition.

Portuguese environmental policies and the European Green Deal – Overview and current status

Tiago Picão de Abreu
Associate Lawyer, Antas da Cunha ECIJA, Lisbon (Portugal)

COVID-19 has affected and jeopardized the environmental and economic objectives of the European Green Deal, which should have initiated its first concrete actions on 2020. However, the suspension or delay of some of these key actions has not prevented some EU Member States of adopting environmental commitments towards similar objectives.

It is our intention in this paper to give a brief overview on the environmental and economic public strategy which is currently being implemented in Portugal and to evaluate the impacts of COVID-19 on the actions and targets established by the European Union for the next years.

In Portugal, several measures were already underway even before the UE Communication that set out a European Green Deal for the European Union (EU) and its citizens[1]. In fact, in 2019, two fundamental documents were approved by the Council of Ministers in accordance with the Green Deal: in June, the Roadmap for Carbon Neutrality 2050 (RNC 2050)[2], and in December the National Energy and Climate Plan (PNEC 2030)[3] with concrete targets for 2030 aligned with carbon neutrality for 2050.

The PNEC's mission was "*to promote the decarbonisation of the economy and the energy transition aiming at carbon neutrality in 2050, as an opportunity for the country, based on a democratic and fair model of territorial cohesion that promotes the generation of wealth and efficient use of resources*".

To fulfill this mission, the PNEC identified 10 objectives:

1. Decarbonize the national economy
2. Give priority to energy efficiency
3. Reinforce the commitment to renewable energies and reduce energy dependence
4. Ensure security of supply
5. Promote sustainable mobility
6. Promote sustainable agriculture and forestry and enhance carbon sequestration
7. Develop an innovative and competitive industry
8. Ensure a fair, democratic and cohesive transition

[1] COM/2019/640 final - 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*.
[2] Resolution of the Council of Ministers No. 107/2019 - Approval of the Roadmap for Carbon Neutrality 2050 (RNC 2050) (https://descarbonizar2050.apambiente.pt/uploads/RCM_107_2019.pdf).
[3] Resolution of the Council of Ministers No. 53/2020 – Approval of the National Energy and Climate Plan (PNEC 2030) (https://apambiente.pt/_zdata/Alteracoes_Climaticas/Mitigacao/PNEC/PNEC%20PT_Template%20Final%202019%2030122019.pdf).

It also established a set of targets for 2030:

- Reduce greenhouse gas (GHG) emissions between 45% and 55% (already in line with the European Commission's new 55% ambition)
- 47% of renewable energy sources in gross final energy consumption
- 35% energy efficiency target
- 20% renewable energy in final energy consumption in Transport
- Lower energy dependence to 65%
- On a sectorial level, the goals for reducing CO_2 emissions are: services by 70%; residential by 35%; transport by 40%; agriculture by 11%; and 30% in waste and wastewater (when compared to 2005)

In terms of the RNC, the ambition for 2050 is to achieve an economic model based on renewable energies and the circularity of resources, with the following ambitions:

1. Reduce more than 85% of GHG emissions compared to 2005
2. 13 megaton ton annual CO_2 forest sequestration capacity
3. 100% of the electricity produced from renewable sources
4. Only about 20% energy dependence from abroad
5. 100% of light vehicles with zero emissions
6. Tax policy that encourages decarbonization and circularity
7. Having private financing for decarbonisation and circularity incorporated in the financial system

To achieve carbon neutrality in 2050 in Portugal, the RNC 2050 identifies a potential reduction, compared to 2005, between 96% to 100%, in total GHG emissions, which can be broken down into sectorial reduction ambitions, namely:

- In the energy sector, a 96% reduction in GHG emissions
- In the industrial sector, a 72-73% reduction in GHG emissions
- In the buildings and other sectors, a reduction of 85-86% in GHG emissions
- In the transport sector, a 98% reduction in GHG emissions
- In the agriculture sector, a 38-60% reduction in GHG emissions
- In the waste sector, a 77-80% reduction in GHG emissions

It is thus clear that there is total alignment in terms of the vision, objectives and decarbonisation goals between Portugal and the European Commission. According to the very recent EU Climate Action Progress Report[4], published by the European Commission on 30 November 2020, Portugal is the country of the European Union closest to reaching its climate targets for reducing emissions by 2030, when compared to 2005 levels. In the same report, it is predicted that, with the current measures, Portugal will exceed on 23% the target set by the European Commission for 2030 (a 17% reduction in GHG emissions compared to 2005 levels), reaching a 40% decline in emissions. And if the additional

[4] https://ec.europa.eu/clima/sites/clima/files/strategies/progress/docs/com_2020_777_en.pdf.

measures provided for in the PNEC are introduced, the Commission expects that this reduction on Portugal will be about 47%.

In November 2019, the European Commission announced its growth strategy based on combating climate change and promoting a green economy, with the Green Deal bringing the environment to the centre of Europe's development policy, and assuming Europe's ambition to be carbon neutral in 2050.

However, COVID-19 came in a sudden way to freeze our economic activity and create a new paradigm of lifestyle that our technological society still does not know how to deal with. This was not just a mere crisis, nor could be compared with any previous one knowable to mankind in modern times. Its human, economic and social impacts may be rightly compared to the consequences of a war, but with two major differences: this kind of war has never happened before and, therefore, no one knew how to respond to a threat of this nature.

Looking at the Roadmap – Key Actions[5] projected for this year of 2020, we can conclude that the implementation of some of the following measures was forcibly postponed or is still only in a legislative publication stage:

Actions	Indicative Timetable	Current Status on 2020 Actions
Climate ambition		
Proposal on a European 'Climate Law' enshrining the 2050 climate neutrality objective	March 2020	The legislative proposal[6] was submitted to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions for further consideration under the ordinary legislative procedure.
Comprehensive plan to increase the EU 2030 climate target to at least 50% and towards 55% in a responsible way	Summer 2020	Pending

[5] Annex to the 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*", available at https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_2&format=PDF.

[6] 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), published on 4 March 2020 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0080) and amended on 17 September 2020 to include a new EU greenhouse gas emission reduction target for 2030, from 50% to 55% (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0563).

Actions	Indicative Timetable	Current Status on 2020 Actions
Proposals for revisions of relevant legislative measures to deliver on the increased climate ambition, following the review of Emissions Trading System Directive; Effort Sharing Regulation; Land use, land use change and forestry Regulation; Energy Efficiency Directive; Renewable Energy Directive; CO_2 emissions performance standards for cars and vans	June 2021	Pending
Proposal for a revision of the Energy Taxation Directive	June 2021	Pending
Proposal for a carbon border adjustment mechanism for selected sectors	2021	Pending
New EU Strategy on Adaptation to Climate Change	2020/2021	Commission adoption planned for first quarter 2021[7]
Clean, affordable and secure energy		
Assessment of the final National Energy and Climate Plans	June 2020	Pending[8]
Strategy for smart sector integration	2020	"*Powering a climate-neutral economy: An EU Strategy for Energy System Integration*" published on 7 July 2020.[9]
'Renovation wave' initiative for the building sector	2020	The Commission published on 14 October 2020 a new strategy to boost renovation called "*A Renovation Wave for Europe – Greening our buildings, creating*

[7] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12381-EU-Strategy-on-Adaptation-to-Climate-Change.

[8] On 17 September 2020, the Commission published a detailed EU-wide assessment of the final National Energy and Climate Plans (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1600339518571&uri=COM%3A2020%3A564%3AFIN). As a follow-up, and as part of the 2020 energy union report, the Commission published individual assessments of each of the national plans for further guidance, together with a short summary in English. Until now, the UK has not complied with its obligation to submit a national energy and climate plan, as required under Withdrawal Agreement between UK and the EU.

[9] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12383-Strategy-for-smart-sector-integration.

Actions	Indicative Timetable	Current Status on 2020 Actions
		jobs, improving lives".[10]
Evaluation and review of the Trans-European Network – Energy Regulation	2020	The revised TEN-E guidelines will be presented in December 2020.[11]
Strategy on offshore wind	2020	The Commission published on 19 November 2020 a dedicated EU strategy on offshore renewable energy.[12]
Industrial strategy for a clean and circular economy		
EU Industrial strategy	March 2020	The Commission published on 10 March 2020 a New Industrial Strategy for Europe.[13]
Circular Economy Action Plan, including a sustainable products initiative and particular focus on resource intense sectors such as textiles, construction, electronics and plastics	March 2020	The Commission published on 13 March 2020 a new Circular Economy Action Plan.
Initiatives to stimulate lead markets for climate neutral and circular products in energy intensive industrial sectors	From 2020	Pending
Proposal to support zero carbon steel-making processes by 2030	2020	The Comission published on 16 July 2020 a Proposal for a Council Decision amending Decision 2008/376/EC on the adoption of the Research Programme of the Research Fund for Coal and Steel and on the multiannual

[10] https://ec.europa.eu/energy/topics/energy-efficiency/energy-efficient-buildings/renovation-wave_en.
[11] https://ec.europa.eu/energy/topics/infrastructure/trans-european-networks-energy_en#revision-of-the-ten-e-policy.
[12] https://ec.europa.eu/energy/topics/renewable-energy/eu-strategy-offshore-renewable-energy_en.
[13] https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020_en.pdf.

Actions	Indicative Timetable	Current Status on 2020 Actions
		technical guidelines for this programme.[14]
Legislation on batteries in support of the Strategic Action Plan on Batteries and the circular economy	October 2020	On 28 May 2020, the European Commission published its Inception Impact Assessment (IIA) to modernize the EU's batteries legislation, in particular Directive 2006/66/EC of 6 September 2006 on batteries and accumulators, and waste batteries and accumulators. The Commission adoption was planned for the third quarter 2020 and is still pending.[15]
Propose legislative waste reforms	From 2020	Pending
Sustainable and smart mobility		
Strategy for sustainable and smart mobility	2020	The Commission adoption was planned for the fourth quarter 2020 and is still pending.[16]
Funding call to support the deployment of public recharging and refuelling points as part of alternative fuel infrastructure	From 2020	Pending
Assessment of legislative options to boost the production and supply of sustainable alternative fuels for the different transport modes	From 2020	Pending
Revised proposal for a Directive on Combined Transport	2021	Pending

[14] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0320.

[15] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12399-Modernising-the-EU-s-batteries-legislation.

[16] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12438-Sustainable-and-Smart-Mobility-Strategy.

Actions	Indicative Timetable	Current Status on 2020 Actions
Review of the Alternative Fuels Infrastructure Directive and the Trans European Network – Transport Regulation	2021	Pending
Initiatives to increase and better manage the capacity of railways and inland waterways	From 2021	Pending
Proposal for more stringent air pollutant emissions standards for combustion-engine vehicles	2021	Pending
Greening the Common Agricultural Policy / 'Farm to Fork' Strategy		
Examination of the draft national strategic plans, with reference to the ambitions of the European Green Deal and the Farm to Fork Strategy	2020-2021	Pending
'Farm to Fork' Strategy Measures, including legislative, to significantly reduce the use and risk of chemical pesticides, as well as the use of fertilizers and antibiotics	Spring 2020 2021	The Comission published on 20 May 2020 a Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system.[17] The legislative measures should occur between 2021 and 2024.
Preserving and protecting biodiversity		
EU Biodiversity Strategy for 2030	March 2020	The Comission published on 20 May 2020 the EU Biodiversity Strategy for 2030 – "*Bringing nature back into our lives*".[18]
Measures to address the main drivers of biodiversity loss	From 2021	Pending
New EU Forest Strategy	2020	On 8 October 2020, during its Plenary, the European Parliament adopted the resolution on the

[17] https://eur-lex.europa.eu/resource.html?uri=cellar:ea0f9f73-9ab2-11ea-9d2d-01aa75ed71a1.0001.02/DOC_1&format=PDF.
[18] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590574123338&uri=CELEX:52020DC0380.

Actions	Indicative Timetable	Current Status on 2020 Actions
		European Forestry Strategy – "*The Way Forward*"[19]
Measures to support deforestation-free value chains	From 2020	Pending
Towards a zero-pollution ambition for a toxic free environment		
Chemicals strategy for sustainability	Summer 2020	The Comission published on 14 October 2020 the Chemicals Strategy for Sustainability – "*Towards a Toxic-Free Environment*".[20]
Zero pollution action plan for water, air and soil	2021	Pending
Revision of measures to address pollution from large industrial installations	2021	Pending
Mainstreaming sustainability in all EU policies		
Proposal for a Just Transition Mechanism, including a Just Transition Fund, and a Sustainable Europe Investment Plan	January 2020	The Comission published on 28 May 2020 an amended proposal for establishing the Just Transition Fund[21]. During its 13 November 2020 plenary session, Parliament voted on an own-initiative report on how to finance the European Green Deal.[22]
Renewed sustainable finance strategy	Autumn 2020	Pending (subject to public consultation)
Review of the Non-Financial Reporting Directive	2020	Pending (subject to public consultation)

[19] Provisional edition at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0257_EN.html.
[20] https://ec.europa.eu/environment/pdf/chemicals/2020/10/Strategy.pdf.
[21] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1592556018727&uri=CELEX:52020PC0460.
[22] Provisional edition at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0305_EN.html.

Actions	Indicative Timetable	Current Status on 2020 Actions
Initiatives to screen and benchmark green budgeting practices of the Member States and of the EU	From 2020	Pending
Review of the relevant State aid guidelines, including the environment and energy State aid guidelines	2021	Pending
Align all new Commission initiatives in line with the objectives of the Green Deal and promote innovation	From 2020	Pending
Stakeholders to identify and remedy incoherent legislation that reduces the effectiveness in delivering the European Green Deal	From 2020	Pending
Integration of the Sustainable Development Goals in the European Semester	From 2020	Pending
The EU as a global leader		
EU to continue to lead the international climate and biodiversity negotiations, further strengthening the international policy framework	From 2019	Pending
Strengthen the EU's Green Deal Diplomacy in cooperation with Member States	From 2020	Pending
Bilateral efforts to induce partners to act and to ensure comparability of action and policies	From 2020	Pending
Green Agenda for the Western Balkans	From 2020	Pending (still on discussion)[23]
Working together – a European Climate Pact		
Launch of the European Climate Pact	March 2020	Commission adoption planned for the third quarter 2020.[24]
Proposal for an 8th Environmental Action Programme	2020	Publised a Proposal for a DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a General Union Environment Action Programme to 2030.[25]

[23] Commission Staff Working Document at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0223.
[24] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12219-European-Climate-Pact.
[25] https://ec.europa.eu/environment/pdf/8EAP/2020/10/8EAP-draft.pdf.

As we can conclude, the European Commission was forced to review its 2020 work programme as a consequence of the coronavirus crisis. Some of the priorities were either reordered or postponed, but the fundamental objectives of ecological and digital transitions were maintained as the principal urgencies on the European agenda.

If in the face of the current pandemic there are some economic agents who consider that the Green Deal should be interrupted in order to focus on more important issues (such as health and the economy), we should consider if it is not precisely through the Green Deal that the current contingencies will be overcome. This is the view of the European Commission, rightly considering that it will be through the green elements of the Green Deal and through digitalization – already a fundamental issue in this phase of seclusion – that the European (and global) economic recovery shall be built. While this continue to highlight the relationship between human health and the environment, it shall also to be considered sustainability as a priority. For this reason, the post-crisis recovery shall be made primarily through a green economy.

Cultural heritage and land uses of sustainable development under the Green Deal and sustainable development goals*

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Transhumance is at the centre of the lives of many pastoral communities (…). For centuries, it has formed the way of life of herders and their families, contributing to the social life and festivities of local communities associated with the tradition. The element is integral to the cultural identities of its practitioners and bearers, forming a strong link with their ancestors and the universe. It enhances ties between families and communities, shapes landscapes and promotes cooperation towards social inclusion and food safety. Transhumance also contributes to the maintenance of biodiversity and the sustainable use of natural resources.

Decision 14.COM 10.B.2 of the UNESCO
Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage
December, 2019

I. Introduction

The European Union has developed the Green Deal has a plan to make the EU's economy sustainable, turning climate and environmental challenges into opportunities, and making one transition just and inclusive for all, from the actual model into a modern, resource-efficient and competitive.

On the one hand, the United Nations adopted the Sustainable Development Goals (SDGs) in 2015. This resulted in a comprehensive set of 17 goals and 169 targets aimed at reducing poverty and advancing wellbeing for all persons in the world by 2030. In this paper carries out a general approach to the SDGs to later relate them to cultural heritage, pointing out what are the aspects of this sector that are - either directly or indirectly - related to them. The Agenda 2030 includes explicit reference to heritage in SDG 11.4 and indirect reference to other Goals. This paper looks also for a real example: the transhumance because it´s very interesting find the SDGs most relevant to the pastoral context and think how the pastoralism can contribute to achieving the SDGs.

On the other hand, it should be noted that this issue is directly related to the environment and its protection. The Spanish Constitution (from now on, SC), inside it´s Title I, says in it´s Chapter III (Of governing principles of the social and economic politics) the article 45:

"1. Everybody entitled to enjoy an appropriate environment for the person's development, as well as the duty of conserving it. 2. The public powers will look after the rational use of all the natural

* This work constitutes one of the results of the Research Project: La nueva información registral: requisitos, eficacia y aplicaciones prácticas (DER2017-83970-P).

resources, with the purpose of protecting and improving the quality of life and to defend and to restore the environment, leaning on the indispensable collective solidarity. 3. for those who violate what is established in the previous section, in the terms that the law fixes will establish penal sanctions or, in its case, administrative, as well as the obligation of repairing the damage caused".

Most of the doctrine considers that the environment is not configured constitutionally as a fundamental right (the Constitutional Court has even established more than once that not all the constitutional precepts are susceptible of constitutional help), but as a guidance principle of social and economic politics, as a asset or collective interest informant of the juridical order. Therefore, if we reach the conclusion that the environment is a collective interest, it is clear that the prevision of the article 128 of the SC *("all the wealth of the country in its different forms and whoever were its ownership is subordinated to the general interest")* must also be related to the environment, in such a way that the conclusion to which it would be necessary to arrive is that all the wealth of the country (and certainly, the property of the land is), independently of its owner it is subordinated, among others, to the general interest of the preservation of the environment. In this way, the right of private property of land finds an abstract and uncertain, but determinable limit in each concrete case that bears limitations for the Sunday holders. On the other hand, the article 148. 1. 9 establish that the Autonomous Communities will be able to assume competitions on *"the administration as regards protection of the environment"*, being specified in the article 149. 1. 23 that the State has exclusive competence on the *"basic legislation on protection of the environment, without damage to the faculties of the Autonomous Communities of establishing additional norms of protection."*

In this way, we can observe how our Supreme Law contemplates the environment in two very different parts, in the article 45 under the heading of the guidance principles of social and economic politics and that she given origin to an extensive and rich debate about if the environment is a right, a subjective right or, simply, a guidance principle, and in the articles 148 and 149 located in the territorial organization of the State, and that discrepancies don't exist as for its consideration as a matter object of distribution of competitions.

This article analyses the attempt to incorporate cultural heritage strategies and land uses into sustainability for human development in the way to achieving the Sustainable Development Goals and the objective of making the EU's economy sustainable, under the plan of the Green Deal. In this context, the above mentioned example of transhumance is an opportunity to demonstrate how an element protected by Cultural Heritage Law can be use in the way of the objectives of an economy more equal and inclusive, where no person and no place will be left behind.

II. Material and immaterial heritage

The importance and value of cultural, historical and artistic heritage is widely recognized under international, national and regional laws.[1] Cultural heritage is perceived as one of the core elements of social, economic and cultural developments and ever more often is guised as a global common good, to which humanity is both the custodian and beneficiary [Decision (EU) 2017/864 of the European Parliament and the Council of 17 May 2017 on a European Year of Cultural Heritage (2018), OJ EU L

[1] BLAKE, Janet, International Cultural Heritage Law, Oxford, 2015; ROODT, Christa, Private International Law, Art and Cultural Heritage, Cheltenham, 2015.

131/1, 20.5.2017]. Art and cultural objects form separate classes of goods, which speak about the human condition and mirror the living conditions of individuals and communities. They provide knowledge about the creative process and the identity of those groups responsible for their production. Cultural heritage expresses continuity between the past and the present, introduces the idea of cultural identity and explains our fascination with antiquities.

In Spanish law, the concept and history of cultural heritage, as well as its deciding characters, have been defined by doctrine but, legally, we can find a definition in the 1985 Spanish Historical Heritage Act (*Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español*,– LPHE) [BOE-A-1985-12534, 29.6.1985]. According to these sources, cultural or historic-artistic heritage is a group of movable and immovable goods with artistic, historical, paleontological, archaeological, ethnographical, scientific or technical interest or value. This definition includes documentary and bibliographical heritage, archaeological sites, natural sites, gardens and parks with artistic, historic or anthropologic value. All these goods are defined by a character of historicity, because the aforementioned Act establishes a special status, in accordance with the notions of time and space.[2]

The notion of time under the 1985 Act includes different possibilities of application. On the one hand, there is a general idea of time as an expression of historical value. On the other hand, there are special rules for goods where the time factor is defined by several years of existence, for instance documentary and bibliographical heritage goods. According to Article 49 LPHE, documentary heritage goods are integrated documents from public and private entities older than a specific number of years. Under Article 50 LPHE, bibliographical heritage goods are composed of manuscripts and printed works with three or less existent copies. Ultimately, cultural value is the determinative element in defining historical-artistic heritage. One should bear in mind that there is always culture in every human activity. The presence of one person implies the existence of culture. Yet the actual "heritagization" requires an assessment of the value of a given cultural manifestation in a determined historical or artistic context. There are some theoretical constructions designed to establish a common concept or denominator for all categories of cultural heritage. One of them refers to the notion of cultural goods, where the adjective "cultural" is used to establish its belonging to the history of civilization. The historical dimension concretizes the ambiguous definition of culture; a cultural good is a testimony of the past. Thus, the concept of heritage is defined by two aspects: culture and history.

Every historical-artistic good is defined by its value in a spatial-temporal perspective and in its cultural dimension. Heritage is a concept to which most people assign a positive value, and the preservation of material and intangible culture is generally regarded as a shared common good by which everyone benefits. These conditions constitute the basis for special regulations under the general expression of cultural heritage law, because of their objective to conserve, divulge and spread culture. Beyond individual rights there is a general interest: there could not be liberty, equality or real democracy

[2] BARRERO RODRÍGUEZ, Carmen, La ordenación jurídica del patrimonio histórico, Madrid, 1990; MARTÍNEZ SANMARTÍN, Luis Pablo, "La tutela legal del patrimonio cultural inmaterial en España: valoración y perspectivas", Revista de la Facultad de Ciencias Sociales y Jurídicas de Elche, vol. I, nº 7, 2011, pp. 123-150; LABACA ZABALA, Mª Lourdes, "La protección del patrimonio etnográfico en España y en las Comunidades Autónomas: Especial referencia al País Vasco y Andalucía", Revista sobre Patrimonio Cultural: Regulación, propiedad intelectual e industrial, nº 2, 2013, pp. 105-148; HERNÁNDEZ TORRES, Estefanía, Patrimonio histórico y Registro de la Propiedad, Reus, 2018; CAPOTE PÉREZ, Luis Javier, "Tangible and Intangible Heritage in Spanish Law", Krakow, 2020 (in press).

without a culture solidly established in society. In Spanish law, Article 46 of the Spanish Constitution (*Constitución Española – CE*) [BOE-A-1978-31229, 29.12.1978] requires public powers to assume and promote the protection of Spanish cultural heritage, giving them great powers to undertake that mission: "The public authorities shall guarantee the preservation and promote the enrichment of the historical, cultural and artistic heritage of the peoples of Spain and of the property of which it consists, regardless of their legal status and their ownership. The criminal law shall punish any offences against this heritage."

The constitutional requirement to public powers has to be complemented with the reference to Spanish territorial organization of the State. According with Article 137 CE, "The State is organised territorially into municipalities, provinces and Autonomous Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests." Respecting to the matter of cultural heritage, there is a distribution of competences between the State and the Autonomous Regions - Articles 148 and 149 CE - so both bodies are required to fulfil the mandate established in Article 46. Consequently, there are autonomous cultural acts, focused on the protection of their regional historic-artistical heritage. However, for the purpose of this paper, only the national act will be considered.

The historical value of a good implies granting it a special status to enable its protection. Accordingly, the formal classification of a good as a cultural one includes an array of obligations and charges. That imposition is a direct consequence of the axiological and policy objective, enshrined in the Spanish Constitution and the 1985 Act to enable more and more people to be able to benefit from the cultural value of the good. Cultural heritage includes goods in private hands, in which case the cultural stewardship should be managed together with ownership rights. Thus, private property rights in cultural goods are demarcated by the general limits of the social function. In this context, that limit is the defence of culture as a collective interest of everyone and particularly affects the freedoms of disposal. In this context, "everyone" includes present and future generations, and not only Spaniards, because *voluntas legis* conceives culture as a universal good (a "universal universality").

The discussion about the universal, national or local nature of cultural heritage is very interesting and transcends national laws and rules. The constitutional duty to protect and encourage culture introduces a limit defined by the "pro-monument" principle: the cultural value of every good declared as part of historical-artistic heritage takes precedence over private rights to it; or the "pro-culture" principle: the preservation of cultural heritage goods is more important than private interests. In private property rights over these kinds of goods, the ancient *ius abutendi* or "right to abuse" is forbidden and marks a boundary between the possibilities for use and the prohibitions placed on a private owner of a cultural good. The social function of ownership acts here as a concrete form of the objective of preservation of historical-artistic goods, in the name of their cultural value. Collective benefits derived from their conservation justifies the imposition of limitations on ownership.

In Spanish law, the concept of historical-artistic heritage includes different categories of goods. First, there are properties of cultural interest (*bienes de interés cultural;* Articles 9 to 39 LPHE), comprising both immovable properties and movable objects. In reference to immovable properties (*bienes inmuebles de interés cultural;* Articles 14 to 25 LPHE) there are five specific categories of protected sites and buildings:

- Historical monuments (*monumentos históricos;* Article 15(1) LPHE): immovable properties comprising of architectural or engineering work or works of colossal sculpture shall be monuments provided they are of historical, artistic, scientific or social interest.
- Historical gardens (*jardines históricos;* Article 15 (2) LPHE): delimited areas resulting from the organization by mankind of natural elements, sometimes complemented with constructions and considered of interest because of their origins or historical past or their aesthetic, sensory or botanical value.
- Historical units (*conjuntos históricos;* Article 15(3) LPHE): groups of immovable properties forming one continuous or dispersed unit of settlement, distinguished by a physical structure representing the development of a human community, in that it testifies to their culture or constitutes a value for public use and enjoyment.
- Historical sites (*sitios históricos;* Article 15(4) LPHE): places or natural landscapes linked to events or memories of the past or to popular tradition, cultural or natural creations and works of mankind having historical, ethnological, paleontological or anthropological value.
- Archaeological areas (*zonas arqueológicas;* Article 15(5) LPHE): places or natural landscapes where there are movable or immovable objects that can be studied using archaeological methodology, whether or not they have been extracted and whether they are to be found on the surface, underground or below Spanish territorial waters.

With respect to movable properties (*bienes de interés cultural;* Articles 26 to 34 LPHE), they are movable goods defined by their cultural interested and should be recorded in a special inventory. Owners or possessors of these kinds of goods shall notify the public administration of the existence of such objects before proceeding to sell or transfer them to third parties. The same obligations are established for individuals or entities that habitually carry out trade in movable property forming a part of the Spanish historical heritage, who are also required to formalize with the administration a register of any transfer made of such objects. This is a concrete example of a limitation on the traditional freedom of owners due to the protection of cultural heritage.

The second large category is archaeological heritage (*bienes del patrimonio arqueológico;* Articles 40 to 45 LPHE). This category includes movable or immovable properties of a historical nature that can be studied using archaeological methodology, whether or not they have been extracted or whether they are to be found on the surface or underground, in territorial seas or on the continent itself. The category also encompasses geological and paleontological elements, relating to the history of mankind and its origins and background, including caves, shelters and places containing expressions of cave art.

The third large category is ethnographic heritage (*bienes del patrimonio etnográfico;* Articles 46 and 47 LPHE). This category includes movable or immovable properties and knowledge and activities that are or have been a relevant expression of a traditional culture of the Spanish nation in its material, social or spiritual aspects. Under this category, the legal regulation distinguishes:

a. Immovable properties (*bienes inmuebles;* Article 47(1) LPHE): any buildings and installations whose method of construction is an expression of knowledge acquired, established and transmitted by custom and whose creation belongs totally or partially to a type or form of architecture traditionally used by communities or human groups.

b. Movable properties (*bienes muebles;* Article 47(2) LPHE): all objects that constitute the expression or the product of labour, aesthetic and pleasure activities of any human group that are established and transmitted by custom.
c. Knowledge and activities (*conocimientos y actividades;* Article 47(3) LPHE): this includes knowledge and activities derived from traditional models or techniques used by a specific community.

Finally, there is another category: documentary and bibliographical heritage (*bienes del patrimonio documental y bibliográfico;* Articles 48 to 58 LPHE): this category includes a great number of elements which have in common cultural testimony through all types of data formats, concretized in concepts like "document" and "library".

There are many differences between these categories. However, the LPHE establishes a system or rules whereby any object possessing the character of historic heritage is subject to defined limitations on the rights inherent in all private property rights over these special goods. These restrictions have consequences in the domain of private law.

The above-mentioned categories encompass a variety of cultural manifestations: tangible properties and intangible heritage, but the legal regulation is specially focused in the former. The latter is mentioned in the category of ethnographic heritage but is only a sub-division in a regulation where the material nature of the great majority of goods protected in the 1985 Act determines the protective regulation contained in it. In the distinction between tangible and intangible heritage, Spanish law is primarily centred on the protection of material goods.

The introduction of the category of ethnographic heritage was considered a pioneering regulation. In a way, the 1985 Act was reflecting some changes in the concept of cultural heritage initiated in the 1970s when the previous pre-eminence of tangible goods was being compensated with some crescent interest about immaterial categories. In another way, it establishes a connection with some historical legal precedents from the Second Spanish Republic. Nevertheless, the regulation of the intangible part of ethnographic heritage was criticized as folklorist and archaic. Ethnographic heritage must be considered as something living since, as a reflection of tradition, it is a link between the past and present, having one unchangeable part and another susceptible of evolving. Despite all this, the 1985 Act did not consider this "living nature" of ethnographic heritage and its effectiveness in the protection of this category was limited.

Alongside, there was a development of the concept of intangible heritage in the areas of Ethnology and Anthropology, finally reflected in the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage [MISC/2003/CLT/CH/14]. This agreement, ratified by the Spanish State in 2006, determined the need of adapting the internal law to its content. This has been done through a new legislation, the 2015 Spanish Safeguard Intangible Cultural Heritage Act (*Ley 10/2014, de 26 de mayo, para la salvaguardia del Patrimonio Cultural Inmaterial*) [BOE-A-2015-5794, 27.5.2015].

The 2015 Act recognizes in its preamble the ampliation of the concept of cultural heritage, introducing the category of activity-goods, together with the previous one of thing-goods. It also mentions the interweaving between tangible and intangible heritage, but points to different ways to protect each one, counter-posing concepts of conservation and safeguarding. Next, in Article 2, it introduces a definition of immaterial heritage as uses, representations, expressions, knowledge and techniques that

communities, groups, and, in some cases individuals, could recognize as an integral part of their cultural heritage, and mentions examples of that categories like:

a. Traditions, oral expressions and linguistic modalities and particularities;
b. Traditional toponymy;
c. Social practice, rituals and festive events;
d. Knowledge and uses related with nature and the universe;
e. Gastronomy, cooking recipes and food;
f. Some specific utilizations of natural landscapes;
g. Some forms of collective socialization and organization;
h. Traditional music, dance and sonorous manifestations.

Nevertheless, the existence of the two national acts and, also, of a new generation of regional cultural acts has not finalised the discussion about the regulation of tangible and intangible heritage in Spanish law. It is true that each category shall be regulated and protected according to its respective nature, but they are not strange to the other. The possibility of one, only and inclusive concept for both categories – for example, cultural goods – has been exposed but there is a difference of thirty years between the 1985 Act and the 2015 Act. The evolution and interaction between their rules must be analysed to determine if the way chosen by the Spanish legislators is useful to fulfil the constitutional mandate of protecting and promoting our cultural heritage, but, for the purpose of this paper, we have to focus on the point that cultural heritage protection rules, which are similar in strategies to natural heritage protection ones, could be useful instruments in the way to win objectives of SDG and the Green Deal.

III. The European Green Deal and the plan to make the EU's economy sustainable

Climate change and environmental degradation are an existential threat to Europe and the world. To overcome these challenges, Europe needs a new growth strategy that will transform the Union into a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases by 2050, economic growth is decoupled from resource use and no person and no place is left behind.

The European Green Deal is the plan to make the EU's economy sustainable. The premise is turning climate and environmental challenges into opportunities and making the transition just and inclusive for all.

The European Green Deal provides an action plan to

- Boost the efficient use of resources by moving to a clean, circular economy
- Restore biodiversity and cut pollution

The plan outlines investments needed and financing tools available. It explains how to ensure a just and inclusive transition.

The EU aims to be climate neutral in 2050. An European Climate Law is proposed to turn this political commitment into a legal obligation.

Reaching this target will require action by all sectors of the European economy, including Investing in environmentally-friendly technologies; supporting industry to innovate; rolling out cleaner; cheaper and healthier forms of private and public transport; decarbonising the energy sector; ensuring buildings are more energy efficient, and working with international partners to improve global environmental standards.

The EU will also provide financial support and technical assistance to help those that are most affected by the move towards the green economy. This is called the Just Transition Mechanism. It will help mobilise at least €100 billion over the period 2021-2027 in the most affected regions.

IV. Sustainable development goals and cultural heritage

In the year 2000, the Millennium Development Goals (MDGs) were agreed upon, which were intended to achieve in a period of fifteen years - that is, by 2015 - a series of goals classified by many as very ambitious, such as the reduction of poverty and hunger, as well as improvements in the field of health, living conditions, environmental sustainability, education and gender equality. Through the MDGs, a lot of progress was actually achieved, so that by no means can a catastrophic vision of them be taken. Thus, the fact of not having achieved them in their fullness should not cloud the visibility of the great and very important achievements obtained.

In September 2015, the UN General Assembly, in an extraordinary summit held in New York, approved the so-called Sustainable Development Agenda, setting the year 2030 as the deadline to achieve a total of 17 SDGs[3] that have their corresponding goals, in total, 169. Unlike what happened with the MDGs, which were aimed at developing countries, the SDGs[4] are open to all countries on earth without exception and, therefore, their economic and legal position is indifferent to global level. In addition, they are posed not only to countries as such but also and in parallel to all institutions,

[3] Goal 1. End poverty in all its forms everywhere
Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture
Goal 3. Ensure healthy lives and promote well-being for all at all ages
Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
Goal 5. Achieve gender equality and empower all women and girls
Goal 6. Ensure availability and sustainable management of water and sanitation for all
Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all
Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
Goal 10. Reduce inequality within and among countries
Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable
Goal 12. Ensure sustainable consumption and production patterns
Goal 13. Take urgent action to combat climate change and its impacts
Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development
Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
Goal 17. Strengthen the means of implementation and revitalize the global partnership for sustainable development.

[4] Detailed information about all of them can be found on the UN website. Available at: https://www.un.org/sustainabledevelopment/es/sustainable-development-goals/ (date of last consultation: December 1, 2020).

entities, administrations, organizations, etc. of the same as well as to each person individually considered: all human beings, no matter where we live and have the characteristics that are, we must get involved in contributing and working towards the achievement of the SDGs through the goals of each one of them.

Picture 1. https://www.un.org/development/desa/dspd/2030agenda-sdgs.html

Like Jyoti HOSAGRAHARIF[5] says, "the SDGs are grouped around the economic, social, and environmental objectives as the three pillars of sustainable development, then culture and creativity contribute to each of these pillars transversally. The economic, social, and environmental dimensions of sustainable development, in turn, contribute to the safeguarding of cultural heritage and nurturing creativity. Cultural heritage — both tangible and intangible — and creativity are resources that need to be protected and carefully managed. They can serve both as drivers for achieving the SDGs as well as enablers, when culture-forward solutions can ensure the success of interventions to achieve the SDGs".

The Agenda 2030 includes explicit reference to heritage in SDG 11.4 and indirect reference to other Goals. The SDG 11 ("Make cities and human settlements inclusive, safe, resilient and sustainable") point 4 says: "Strengthen efforts to protect and safeguard the world's cultural and natural heritage".[6]

[5] HOSAGRAHARIF, Jyoti, "Culture: at the heart of SDGs", *The UNESCO Courier*, april-june, 2017. Available at: https://en.unesco.org/courier/april-june-2017/culture-heart-sdgs (date of last consultation: November 2, 2020).
[6] Indicator 11.4.1: Total expenditure (public and private) per capita spent on the preservation, protection and conservation of all cultural and natural heritage, by type of heritage (cultural, natural, mixed and World Heritage Centre designation), level of government (national, regional and local/municipal), type of expenditure (operating expenditure/investment) and type of private funding (donations in kind, private non-profit sector and

Given the importance of the 2030 Agenda, it could be thought that the reference to cultural heritage, which is included in Goal 11, is minor. However, nothing could be further from the truth. On the one hand, culture and, therefore, cultural heritage, have proven to be a very powerful tool to face important challenges because a person has had access to culture is a person with training, and it is essential to have sensitized people to achieve the SDGs. On the other hand, the intangible cultural heritage itself can be a generator of benefits, as will be shown in the next section.

V. A real case: transhumance, the seasonal droving of livestock along migratory routes in the mediterranean and in the alps

The transhumance constitutes a living heritage.[7] The main advantages of its practice, in addition to the fact that it currently constitutes a not inconsiderable tourist incentive for the areas where it's carried out, can be synthesized in the following: it allows optimal fertilization of the soil through which the animals pass, prevents forest fires by reducing the presence of weeds, helps to conserve natural spaces, contributes decisively to the proliferation of different species in addition to opening ways for other animals to pass more easily. It's also important to note that with transhumance, the social relations of different rural populations are promoted, the contact between different populations, which contributes to the wellness of people.[8]

We can cite a concrete example: the transhumance, the seasonal droving of livestock along migratory routes in the Mediterranean and in the Alps (Austria, Greece and Italy). It was inscribed in 2019 on the *Representative List of the Intangible Cultural Heritage of Humanity*.

Like the nomination for inscription in 2019 on the list pointed[9], the transhumance has several functions related to cultural identity, shaping landscapes, cooperation for social inclusion and food safety and sustainability.

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sponsorship). Available at: https://www.informea.org/en/goal/target-114 (date of last consultation: November 18, 2020).
But like PETTI *et alt.* says, the current SDG11.4 indicator is inadequate in representing the challenges and opportunities of cultural heritage withinthe context of sustainable development. To enhance the comparability of heritage data across cities andcountries, there is a crucial requirement for standardised methods for perceiving, valuing, measuringand monitoring heritage. Therefore, national and local capacity development is needed to ensurethe sustainability of national and local processes. PETTI, Luigi, TRILLO, Claudia and MAKORE, Busisiwe Ncube, "Cultural Heritage and Sustainable Development Targets: A Possible Harmonisation? Insights from the European Perspective", *Sustainability*, 12, 926, 2020, p. 22.

[7] V. on traditions and heritage, MARCOS ARÉVALO, Javier, "La tradición, el patrimonio y la identidad", *Revista de estudios extremeños*, vol. 60, nº 3, 2004, pp. 925-956. Also, BARRÈRE, Christian, "Cultural Heritages: From Official to Informal", *City, Culture and Society*, vol. 7, 2016, pp. 87-94.

[8] VVAA, *Un marco jurídico para un desarrollo rural sostenible*, Coord. Esther Muñiz Espada, Ministerio MARM, 2011.
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[9] Available at:https://ich.unesco.org/en/decisions/14.COM/10.B.2 (date of last consultation: November 20, 2020).

a) Cultural identity. Transhumance contributes to shape the identities of practitioners and bearers, forming a strong link with their ancestors and the universe. It inspires a way of life that lends itself to spiritual enquiry. When herders are asked why they maintain such a challenging way of life, the answer is often simply because they love it, because it makes them feel 'free'. Thus, transhumance is more than just a profession for its practitioners but a way of life where time is measured in the passing of the seasons and home is moving with the livestock. Freedom of movement has always represented a pillar of this practice, affecting livestock, as well as transhumant herders and their families, at different levels.

Enhancing ties between families and communities. Over generations, familial, social, and cultural bonds have been formed by communities, shown i.a. by the high incidence of identical family names. Even abroad, some emigrant communities still feel this sense of identity, and keep the element alive abroad through social practices, such as festivals, rituals and the wearing of traditional dresses.

b) Shaping landscapes. Transhumance has an impact on the spatial heterogeneity of vegetation, affecting ecosystem processes and landscapes. Communities have used local resources to build new reed huts every year or to repair the old ones. Transhumance has also influenced the development of historical settlements along routes or the rise of monuments and places of worship.
c) Cooperation for social inclusion. Transhumance has played a key role in supporting peripheral economies in the rural contexts of villages and inland areas, which have been facing massive depopulation. Hence, the element not only contributes to the continued practice of traditional knowledge and skills of practitioners, but also ensures their ecological and economic sustainability. Indeed, transhumant caravans have also facilitated contacts and commerce between distant communities (for example, for the selling of transhumance-related products), the development of settlements and complementary farming activities, thereby creating sustainable and resilient networks.
d) Food safety and sustainability. Transhumance plays a vital role in environmental protection, as explained in paragraph v of this section. In fact, thanks to the sustainable use of land and water resources and admitting livestock to live in the wild, food prepared using milk and meat of transhumant livestock and clothing made from wool, fiber and leather, have lower environmental impacts than similar products from intensive farming. It additionally reduces the incidence of pollution, the reliance on veterinary products (among them antibiotics) and thus produces healthier food, from livestock reared in the open air, which are fit and more resistant to diseases. Besides, the cheese-making products of transhumant livestock farming are considered of high quality. It is attributed to the traditional cheese-making know-how and the specialized knowledge of livestock farmers about vegetation and the features of the flora of pastures.

Therefore, we can conclude that cultural heritage, including intangible, can contribute to sustainable environmental development and improve the quality of life of the people who inhabit it. We have no doubt that the cultural heritage as an important resource for sustainable urban development. The magnitude of the objectives that we have to achieve is very important, so that all the tools and means available must be used.

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The European Green Deal faced with the pandemic from Covid-19: the case of Italy

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1. Introduction: The EU Green New Deal and the sustainability of agriculture

The term "sustainability" appears increasingly combined with business activity, especially with regard to the environmental impact that this activity entails, as the shared objective is to avoid that the performance of any productive activity, due to the progressive development of new and increasingly sophisticated technologies, can have a negative impact on the conservation of the environment, on the one hand by irreversibly impoverishing natural resources and, on the other, contributing to the deterioration of the ecosystem as a result of polluting emissions.

It is worth to reflect, with regard more specifically to entrepreneurial agricultural activity, on emphasis placed on environmental sustainability in the documents relating to the outline of the framework of the next CAP, which will apply for the period 2021 - 2027, as evidenced by the recent Commission communications on the so-called "The European Green Deal", involving a particularly ambitious future action in this respect, aimed at promoting not only an agriculture more resilient to climate changes but also able to contribute to their fight, and to ensure that the European continent can become climate-neutral by 2050. This strategic programme - which goes, moreover, beyond the agricultural sector alone - has led, so far, to the adoption of an action plan for the circular economy [COM (2020) 98], a proposal for a framework regulation for the achievement of climate neutrality [COM (2020) 80]; furthermore, as far as the agricultural sector is concerned, the Communications from the Commission to the EP and the Council of 20 May 2020 on the strategies "A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system" [COM (2020) 381] and "EU Biodiversity Strategy for 2030. Bringing nature back into our lives" [COM (2020) 380] must be remembered.

Considering these latter documents, whose perspective transcends the contingencies of the current Covid-19 pandemic, they show the intention to develop an even "greener" CAP than the current one, where rules concerning greening, cross-compliance and agro-climatic-environmental measures already operate, albeit in a poorly coordinated way, and with not particularly satisfactory results.

For the next financial programming period the E.U., with this new strategy, outlines a series of actions that will inevitably involve the agricultural activity from different points of view: think about the objective of increasing the protected areas, to reach their extension up to 30% of the land surface and of the sea surface as well, of which at least one third should be subject to protection defined as "strict". The increase of the protected areas will, therefore, inevitably affect the agricultural activity, since, especially in the presence of "strict" protection measures, it may go so far as to inhibit the development of productive activity. In the framework of the new CAP for the period 2021 - 2027 should, moreover, according to the above-mentioned planning documents, be encouraged completely sustainable agricultural practices - such as precision farming, organic farming, agro-ecology, agro-forestry, low-

intensive permanent grassland, the adoption of stricter animal welfare standards. At the same time regulatory provisions should be introduced to impose a reduction, by 2030, 50% of the use of chemical pesticides in general and 50% of the hazardous ones; by the same date at least 10% of the agricultural land must be brought back under high-diversity landcape features, and that at least 25% of the agricultural land must be organic farmed, with a reduction in the use of fertilizers of at least 20% compared to today's levels.

What is most interesting about this program, for the moment only outlined, is the provision not only of financial incentives to encourage the adoption of virtuous practices from an environmental point of view, but also, and above all, the expected introduction of rules prohibiting or otherwise limiting the use of pesticides and chemical fertilizers and binding on the use of certain agricultural land.

Certainly, it is that it will be necessary to wait and verify as such strategic intentions will be then concretely implemented: it is desirable, in fact, that the innovations foreseen do not bring with themselves further complexities in the management of the future CAP and the assuring of the availability of supplies of the agricultural products, as established by art. 39 TFEU.

In fact, it is not in doubt that food security remains one of the main objectives of the CAP as well as recent experiences, linked to the Covid-19 pandemic, have well highlighted. It is necessary, therefore, not to forget, alongside the sacrosanct aspects of environmental sustainability that must characterize agricultural production activity, the sustainability profiles related to the security of food supply, since the indispensable function of the CAP is to be able to guarantee European citizens the regular and adequate supply of agricultural products needed to meet the food needs of the continent, avoiding the dependence on imports that, as the pandemic has clearly demonstrated, cannot concern, beyond a certain extent, essential goods, to avoid an economic-political-strategic dependence on other States.

It goes without saying that the task of coordinating the profiles of environmental sustainability, as outlined in the planning documents mentioned above, with those related to food security does not seem to be an easy job, with the risk of having, as a result, regulatory texts messed up as they are the outcome of the countless and increasingly inevitable compromises between the various Member States.

Moreover, next to environmental sustainability, and next to food security, there is a third form of sustainability: the necessary economic sustainability of the primary activity.

On the contrary, to see well the economic sustainability of the agricultural entrepreneurial activity (as of any other business activity) is a necessary prerequisite with respect to any other form of sustainability, since it will be possible to have agricultural enterprises capable of producing essential goods for society only if such activity is able to ensure them an adequate economic return.

And there is no doubt that even this form of sustainability had already been taken into due account at the time of drafting the Treaty of Rome, as it is easy to see from the reading of Article 39 TFEU which, unchanged from the original version of the Treaty of Rome, identifies the objectives of the common agricultural policy, including the need to ensure a "fair" standard of living for the agricultural community.

As known, the economic sustainability of the European agricultural production sector is severely tested by the characteristics of the activity and its market.

As for the former, think of the fact that farmers deals with living entities - vegetable or animal - with all the consequent problems linked to the possible presence of various types of pathologies that may not lead to the planned and hoped-for results; to the interdependence between most agricultural production activities and the surrounding environment, so that production may be jeopardized by adverse or otherwise unfavorable climatic conditions; to the need to respect the times imposed by nature, such as to involve most often long production cycles, with the consequent financial difficulties.

As for the latter, it is sufficient to recall the strong fragmentation that affects the supply sector of agricultural products, the dynamics that contribute to the determination of prices, the inelasticity of demand with respect to prices of goods and consumer incomes. In this way, even when it is possible to reach the quality and quantity targets, the producer is still faced with the additional obstacles present in the marketing phase of the production obtained.

In this context, the support that the CAP proposes to provide to those who, without such intervention, would probably not find reasons to continue in a business activity subject to such constraints and limitations, cannot be so surprising.

These considerations, although taken for granted and at the limit of the obviousness, have to be taken into account every time the European legislator puts his hand to the regulatory system of the CAP since, with increasing emphasis, is regularly emphasized the need for agricultural production to be carried out in an environmentally sustainable way. This is indisputably a necessity also because, in addition to responding to a precise public opinion demand, the pursuit of environmental sustainability of agriculture is a mandatory path, because only by safeguarding productive resources (think of the soil and its wealth, or the availability of water) and only by contributing effectively to climate change it is possible to assume an agriculture even in the most distant future.

“Green" agriculture is not, therefore, a whim, but a necessity, only if we want to look at medium-long term time horizons and ensure that Europe can continue to have an agri-food production in adequate quantity and quality.

At the same time, however, it is not possible to focus attention only on aspects of environmental sustainability, as farmers must in any case be guaranteed sufficient income to induce them to continue their business activities.

And so, the "blanket" represented by the financial current measures allocated by the CAP risks proving to be too short, as it does not seem possible that the allocated resources for the benefit of farmers can effectively guarantee the pursuit of sustainability in the three essential declensions mentioned above.

The task for the Institutions of the Union, in the next future, is therefore very difficult: currently, however, it seems premature to examine the texts of the regulatory proposals and strategic documents drawn up by the Commission, also because the process for the definition of new regulatory texts is long and not easy, so that the final choices may differ from the original proposals.

It is therefore advisable to focus on the immediate. And the immediate does not seem particularly reassuring, in the light of the dramatic effects linked to the Covid-19 pandemic that have, in many cases, further aggravated the fate of the sector.

We will then analyze some of the interventions implemented by national authorities to deal with the effects of the pandemic, with regard to both the functioning of the agricultural market and to the contractual relationships of the supply chain.

2. The measures adopted in Italy: to protect the agricultural market struggling with Covid-19

There is no doubt that Covid-19 has had a strong impact on world agricultural markets, and not only European.

In particular, with the spread of the virus, national markets for agri-food products - as well as those relating to other essential products, just think of personal protective equipment or certain medical aids or pharmaceutical products - have in many cases been subject to protectionist measures by government authorities, in order to avoid exports of goods necessary to combat the virus or for the lives of their citizens, so that obstacles to the free circulation of these products on the world market have often been encountered, with the consequent alarms - as regards agri-food products - in order to ensure the regular supply of food. In addition to the free movement of goods, the spread of the pandemic has also heavily affected the movement of people in general and of workers in particular, and this also within the EU Member States, giving rise to problems in recruiting the necessary manpower, especially for the phase of the harvest of many agricultural productions.

Add to this the psychological impact caused by the advent of the virus which led, especially in the early days, to real attacks on supermarkets in fear - irrational - of a sudden emptying of the shelves.

Thus, the specter of food insecurity has returned to hover, even in light of the modest stocks of strategic commodities, such as cereals, in the European Union, equal to only 12% of their annual consumption, and thus sufficient to a period of only approx. 43 days.

The rules of the WTO, already in a state of great crisis following the commercial disputes that developed between major world powers, in particular between the USA and China, have undergone further weakening following Covid-19 crisis also for agricultural products, although in many cases temporary restrictions on exports of essential goods, such as agricultural and foodstuffs, could not be said to be without legitimacy in the light of the GATT principles.

It is therefore not surprising that in such a framework many States have expanded the scope of companies considered of strategic importance and have encouraged industrial reconversions in order to obtain endogenous production of goods whose production was previously regularly outsourced to countries third parties.

Even Italy has not remained inert on this front, as evidenced by the extension of the rules on the so-called “golden power” also to the food sector. Quickly reviewing the legislation in this regard, it should be noted that with the d.l. (law decree) 15 March 2012, n. 21, converted, with amendments, into law 11 May 2012, n. 56, was provided, in art. 1, that with DPCM (Decree of the Prime Minister) the activities of strategic importance for the national defense and security system should have been identified for which a series of measures, indicated therein, could have been adopted in order to protect the "Italian character" of the companies concerned, banning or limiting the entry of foreign capital.

This rule, still in force, requires that the adoption of one or more Prime Minister's Decree for the identification of companies considered strategic must take place on the proposal, depending on the reference areas, of the Minister of Defense or of Internal Affairs, in agreement with the Ministers of Economy and Finance, Foreign Affairs and Economic Development. Although the provision referred to the possible imposition of specific conditions in the event of the purchase by foreign investors of shareholdings "relating to security of supply" (thus letter a) of paragraph 1 of art. 1), the same letter clarified that the companies concerned were those "strategic for the national defense and security system". So that the food sector did not seem involved in the regulatory provision, as indirectly confirmed by the identification of the competent Ministers to intervene in the drafting of the Prime Minister's Decree and by the very title of the law, which in fact refers only to the defense and national security sectors, energy, transports and communications.

Subsequently, Regulation (EU) 2019/452 was adopted, applicable from 11 October 2020 pursuant to art. 17: it was intended to create a common regulatory framework to be able to screen (art. 2, par. 1, (3): 'screening' means a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments) foreign direct investments, noting that the main trading partners of the Union had already developed regulatory frameworks for this type. The regulation thus allows Member States to maintain, modify or adopt mechanisms to screen foreign direct investments in their territory on the grounds "of security and public order" (thus Article 3, par. 1, reg. 2019/452).

Pursuant to art. 4, in determining whether a foreign direct investment may affect security or public order, Member States and the EU Commission "may" take into account its potential effects at the level, inter alia, of "supply of critical inputs, including energy or raw materials, as well as food security"(art. 4, par. 1, c).

Food security needs can, therefore, justify the activation of control measures and limitation of foreign direct investments even if, obviously, it will be necessary to concretely highlight the existing link between a target agri-food company and the reasons for security and public order that can legitimize restrictions to foreign direct investments. In essence, the regulatory provision just mentioned generically identifies food security needs among those potentially suitable to justify interventions to protect security or public order and identified, in any case, purely by way of example ("inter alia") by the regulation.

As often happens, the Italian legislator then transformed the "finger" into an "arm" when, in full emergency from Covid-19, fearing that the effects of the pandemic could have made many national companies, weakened by emergency measures, a land of conquest of foreign investors, has adopted the d.l. (law decree) 8 April 2020, n. 23, then converted, with amendments, into law no. 40, with which art. 15 has extended the obligation to notify the purchase for any reason of shareholdings in companies that hold assets and relationships in all the sectors identified in art. 4, par. 1, lett. from a) to e) of reg. EU n. 2019/452 and, therefore, also in the sector of supply of critical inputs, including food (mentioned in letter c).

Despite the complexity of the topic and of the legislation, the approximation with which the present regulation was written is evident prima facie, given that the absence of limitations means that substantially every acquisition of shareholdings in food companies (to limit the field to this sector only)

should, strictly speaking, be considered subject to the discipline in question, as if every food business can or should be considered strategic for the purposes of security of supply.

The state of emergency has also induced the European Union to intervene in the state aid sector, in order to allow Member States to be able to provide liquidity to businesses in every sector, including the agri-food sector, in order to avoid a possible systemic collapse. And, thus, ensure the economic sustainability of businesses, the pursuit of which has been the cornerstone of most of the emergency measures.

Thus, already on March 19, 2020, the Commission adopted Communication C (2020) 1863 laying down a "Temporary framework for state aid measures to support the economy in the current Covid-19 outbreak": in summary, this communication contains the Commission's guidelines to allow the Member States to be able to assess the compatibility with the treaty of the state aid granted until 31 December 2020, in order to allow the respective businesses to be able to cope with the emergency resulting from Covid-19, expanding substantially the eligibility thresholds respect to the "ordinary" regulatory framework.

Italy has also made use of this opportunity on several occasions, such as the so-called d.l. "raise" (19 May 2020, n. 34), containing a flood of aid measures authorized by the Temporary Framework, notified to the Commission on 20 May and approved by the latter already the following day. Before that, art. 78 of the d.l. 17 March 2020, n. 18, converted, with modifications, into law 24 April 2020, n. 27, contains aid measures dedicated to agricultural enterprises, also approved by the Commission as they are deemed to comply with the aforementioned Temporary Framework.

Still on the topic of the functioning of agricultural and agri-food markets, the pandemic has also accelerated the process for the implementation of the possibility, offered by Union law by means of the Commission regulation n. 2019/316, to increase the threshold of aid payable to primary sector operators within the scheme relating to the de minimis aid. The reg. EU 1408/2013, in fact, allowed Member States to grant certain minor aid to primary producers without the need for notification, as they are considered not distortive of competition: in particular, such aid cannot exceed the amount of € 20,000 for a single undertaking over a three-year period and, overall, the aid granted under this heading cannot exceed a specific national cap set out by the regulation itself.

The EU regulation 2019/316 has amended the reg. EU 1408/2013, assigning to the States the possibility of legitimately providing de minimis aid within a higher threshold for each single undertaking, established in € 25,000 over the three-year period, with a consequent increase in the national cap (equal to 1,5% of the annual output), provided that the aid intended for a specific production sector does not exceed a sectoral limit identified in 50% of the total de minimis aid granted over the three-year period. To allow the verification of the non-exceedance of this sectoral limit, the 2019 regulation prescribes, as a further condition for the increase in the amount of aid payable to each single undertaking, the mandatory introduction of a national aid register, whose activation was previously left to the discretion of Member States. Only a national register can, in fact, allow the verification of the sectors benefiting from the aid measures and the control of whether the maximum limit set for the sector is not exceeded.

At the same time, the new regulation has extended the period of validity of the reg. 1408/2013 as amended, originally intended to expire on 31 December 2020, until 31 December 2027.

As anticipated, the negative externalities of the pandemic on the agricultural sector led the Italian government, with the D.M. (Ministerial Decree) 15 May 2020, n. 5591, to take advantage of this possibility by increasing the threshold of de minimis aid payable to a single undertaking over the three-year period in the agricultural sector from € 20.000 to € 25,000, using the state aid register already established at the SIAN (National Agricultural Informative System), with which it will be possible to monitor whether the sectoral limit set by EU law is not exceeded.

In this way, the ceiling available for Italy for this type of aid has increased from approx. 700 million euros to 840 million euros, thus making approx. 140 million additional: which, in a generalized moment of difficulty, however, represents a wise use of a faculty attributed by EU law.

During the most acute period of the emergency phase, however, it seems that the entire agri-food system has continued to operate regularly, as confirmed by the ICQRF (the national body with the task of controls on agri-food quality products) with its Report on the controls in the agri-food chain carried out in the period 1 February - 30 April 2020: this report shows that the rates of irregularities found as a result of the control activity carried out are substantially corresponding to those found in previous periods, without significant deviations.

3. … and in sector of agri-food supply chain contracts

As can be imagined, the COVID-19 emergency has produced effects not only on the functioning of the agri-food market as a whole, but also in relation to the individual contractual relationships that connect the various links of the product chain, and this even if the sector has not been affected by measures of suspension of the activity which, on the other hand, have concerned other productive sectors.

As regards, specifically, the contractual relationships operating within the agri-food product chain, the Italian legislator - unlike the Union one - felt the need to intervene in the matter, even if with a certain approximation and superficiality and for purposes that could be essentially, if not exclusively, "theatric".

It is worth mentioning the emphasis given to the opening, on March 30, 2020, of the e-mail box “pratichesleali@politicheagricole.it” at the Ministry of Agriculture, Food and Forestry Policies: this box should facilitate the forwarding of reports about the existence of unfair commercial practices in contracts for the sale of agricultural or foodstuffs products.

In the aforementioned Report on the control activity carried out in spring 2020, the ICQRF reports that in the month of April 2020 alone about twenty complaints were received, of which about half related to the bovine and buffalo milk sector, concerning unilateral changes of the contractual conditions (agreed prices and quantities) carried out by milk processors and cheese factories. The other complaints concern increases in the prices of fruit and vegetables in central and local markets: cases which, at least at first glance, appear unrelated to the phenomenon of unfair commercial practices (hereinafter, u.p.c.).

As anticipated, the legislator has not remained inert in the face of the spread of the pandemic and the disturbances it has brought on the market. In fact, at the very beginning of the spread of the virus, the Government adopted the D.L. (law decree) 2 March 2020, n. 9, whose art. 33 (later repealed by

art. 1, paragraph 2, of the law n. 24.4.2020, n. 27) contained “measures for the agricultural sector”. In particular, paragraph 4 of art. 33 provided that the "subordination of the purchase of agri-food products to non-mandatory certifications referring to Covid-19 nor indicated in supply agreements for the delivery of products on a regular basis prior to the agreements themselves" is "an unfair commercial practice prohibited in relations between buyers and suppliers pursuant to Directive (EU) 2019/633". The next paragraph provided, for the case of infringement, the pecuniary administrative fee from € 15,000 to € 60,000, to be established in relation to the benefit received by the offender. The tasks of assessment (upon notification or even ex officio), control and sanctions have been assigned to the ICQRF: and this should explain why the form for reports, referred to in the e-mail box activated at the Ministry is addressed to that body.

The aforementioned law decree has not been converted into law and the article in question has been expressly repealed (without prejudice to the effects produced and the legal relationships arising from it) by law April 24, 2020, n. 27, of conversion of the d.l. 17 March 2020, n. 18: which, with some modifications (for example, the express reference, alongside the agri-food products, also to those of fishing and aquaculture: which, moreover, are always agri-food products), reproposed the text repealed in its art. 78, paragraphs 2-bis and 2-quater.

There are innumerable perplexities regarding this provision and in relation to which specific work should be dedicated to them. Here it is sufficient to point out that: i) the provision refers to a notion of u.c.p. pursuant to EU directive 2019/633 which has not yet been implemented in our legal system, and for which the deadline of 1 May 2021 for its implementation applies; ii) the aforementioned directive, moreover, does not identify an abstract category of u.c.p., but only some typified cases of conduct that can constitute u.c.p., however, leaving the Member States the possibility to introduce additional cases; iii) it is not clear whether the subordination of the purchase to the presence of non-mandatory certifications referring to Covid-19 is prohibited, constituting u.c.p., only if requested after the conclusion of the contract - and thus constitutes an arbitrary and illegitimate behaviour of the purchaser - or whether such an agreement is to be considered prohibited; in this regard, the second sentence "nor indicated in supply agreements for the delivery of products on a regular basis prior to the agreements themselves" does not help: in particular, it is not clear whether the latter should exist to integrate the u.c.p. or if it is a second type of u.c.p .; even before that, the literal formulation of the provision itself appears ambiguous, not understanding how it is possible to identify agreements that contain the request for non-mandatory certifications referring to Covid-19 that occur "on a regular basis" and that are, moreover, "prior to the agreements themselves"; it is self-evident that a prohibitive rule must, on the contrary, be easily intelligible and equally easy to apply: otherwise, the rule risks remaining a dead letter; iv) it is not clear what influence the prohibited behavior has for the purposes of the validity and effectiveness of the contract that has already been concluded without certification request clauses and, therefore, whether the seller still has the possibility to request fulfillment of the contract and / or compensation for damages for non-sale; v) the penalties provided for differ from those already indicated in art. 62, d.l. n. 1 of 2012 (containing the general regulation on the subject of u.c.p. in the agri-food sector) both in relation to the amounts and in relation to the criteria indicated for the concrete quantification of the penalties; vi) the powers of control and sanctions are attributed to the ICQRF when the same powers, for any other u.c.p. in the same sector, are attributed to the Italian Antitrust Authority.

In summary, the provision appears to assume above all "media" value (as evidenced by the emphasis shown by the government authority towards the mass media) rather than as an effective tool for the protection of primary producers, as well as being a harbinger of serious regulatory distortions.

Still on contractual relationships concerning agricultural or agri-food producers, can be mentioned the provisions of paragraph 2-duodecies of art. 78 of the aforementioned Law Decree n. 18/2020, which provides that PDO and PGI agricultural and food products, including wines and spirits, can, in a manner to be defined in a subsequent Ministerial Decree, be subject to a revolving pledge. Actually, this is not an absolute novelty, since law no. 401 of 1985 provided for the revolving pledge for hams with designation of origin, and art. 7 of the law n. 122 of 2001 (and the related Ministerial Decree of 26.7.2016) had extended it, and regulated it, for long-matured cheeses with designation of origin. With the provision in question, however, the basket of products susceptible to a revolving pledge has been substantially expanded, which entails the benefit, for the debtor, of avoiding dispossession of the assets granted as pledges. The Ministerial Decree required by law was quickly adopted as early as 23 July 2020, and essentially contains the implementing provisions regarding the discipline of the register required by law for the identification of products subject to the revolving pledge.

Also in this case, we are faced with a measure linked to the emergency (although, it seems, permanent and not only transitory), to allow interested entrepreneurs to be able to access credit more easily, in light of the collateral acquired by the lender, even if some cones of shadow remain, given that the regulatory provision does not shine for clarity, giving rise to numerous applicative and interpretative doubts, such as to be able, ultimately, to undermine the functionality and effectiveness of the measure.

Among the various measures intended to deal with the emergency and such as to affect contractual relationships involving agricultural and agri-food producers, it is worth recalling paragraph 3-quater of art. 78, d.l. n. 18 of 2020, which allows, in the emergency period, the issuance by the control bodies of certificates of suitability in relation to organic production and PDO or PGI agri-food products even if without on-site accesses, "also on the basis of a risk assessment "and provided that" sufficient information and evidence is collected" and on the basis of formal declarations made by the businesses concerned, and without prejudice of subsequent business verification once the emergency has ceased. Also in this case, in the balance between environmental sustainability and economic sustainability, the crisis resulting from the pandemic has made - albeit in an exceptional and transitory way - hang the heaviest weight on the plate of the second.

Climate change and the individual in the Finnish legal system

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Abstract

The Climate Act (2015) requires that state bodies adopt and update strategic plans for both climate change mitigation and adaptation. These plans shall be observed when developing other public plans. Individuals and organizations are entitled to obtain information and to present their opinion. In permit procedures individuals may obtain compensation from the permit-holder in case of environ- mental damage. Claims for compensation may also be brought in civil and criminal cases but only if there is evidence that climate change has caused environmental damage or other losses. Presently, this is unlikely. Class actions are not permitted in environmental cases.

Das Klimagesetz (2015) schreibt vor, dass staatliche Stellen strategische Pläne für den Klimaschutz und die Anpassung an den Klimawandel verabschieden und aktualisieren. Diese Pläne sind bei der Entwicklung anderer öffentlicher Pläne zu beachten. Einzelpersonen und Organisationen haben das Recht, Informationen zu erhalten und ihre Meinung zu äußern. In Bewilligungsverfahren können Einzelpersonen im Falle von Umweltschäden vom Bewilligungsinhaber eine Entschädigung erhalten. Entschädigungsansprüche können auch in Zivil- und Strafverfahren geltend gemacht werden, allerdings nur dann, wenn es Beweise dafür gibt, dass der Klimawandel Umweltschäden oder andere Verluste verursacht hat. Gegenwärtig ist dies unwahrscheinlich. Sammelklagen sind in Umweltrechtsfällen nicht zulässig.

1. The regulatory basis of climate law

Finland is a member state of the European Union and party to all essential environmental conventions. So, at the international and the EU level, Finland is committed to fulfil the imposed and agreed commitments. The most relevant sectors in terms of climate change are industry, forestry, traffic and agriculture. The physical impacts of climate change have been rather soft so far but especially water-related risks (flood), changes in the agricultural sector and flora are included in national mitigation and adaptation strategies.[1]

Citizens' rights to participate in administrative procedures as well as the right to obtain environmental information are legally guaranteed without proof of interest. Environmental law does not specifically include or exclude climate change as an argument for action. As far as energy law is concerned,

[1] For comparative aspects on climate instruments see Hollo (2012), pp. 229–272. Finland's National Strategy for Adaptation to Climate Change. Publications of the Ministry of Agriculture and Forest 1a/2005, Summary: "The Finnish Meteorological Institute compiled the climate change scenarios based on the existing international and national data. According to the estimates on the future climate change in Finland, by 2080 the average temperature could rise by 4 - 6°C and the average precipitation would grow by 15 - 25 %. Extreme weather events, such as storms, droughts and heavy rains, are likely to increase." See also Hollo et al. (2011), pp. 399–432.

citizen's rights seem for the most not to be relevant unless measures or decisions involve environmental consequences or risks.

In public procedures, citizens may direct their claims both against public bodies, companies and private actors. Also, the official principle requires as a rule that authorities arbitrate between the parties as set by law. In some fields, e.g. in water and mining law, the authority also settles compensation claims between the permit-holder and other parties. In this context, today theoretically, the assessment of dam- age might cover also future losses caused by climate change, supposed that the project would in size be responsible for a share of global warming as well as for its national impacts.

2. Implementation of the international climate change agenda concerning mitigation and adaptation as basis for claims of individuals (Climate Act)

Finland has implemented its international climate obligations by several legal instruments within the framework of the European Union. National law incorpo- rates rulings concerning emissions trading, the use of renewable energy and more. Binding law concerning specifically and comprehensively the impacts of climate change does not exist. Instead, programmes and strategic instruments dealing with mitigation and adaptation, based on scientific data, have been adopted nationally.

The Finnish Climate Act (CA, 609/2015, ilmastolaki; following is based on an unofficial English translation adopted by the Finnish Government, available at Finlex Data Bank) addresses in particular public authorities as they have to enforce climate strategies and land use plans. Several ministries have adopted political miti- gation and adaptation strategies for over 10 years by now. Basically, the Climate Act regulates strategic planning, under the perspective of EU law. One additional pur- pose of the Act is to "strengthen the opportunities of Parliament and the public to participate in and affect the planning of climate change policy in Finland. This Act lays down provisions on the tasks of state authorities in drawing up climate change policy plans and ensuring their implementation" (CA Sec. 2.1).

As a rule, the Finnish legal order does not set direct climate-related obligations on business actors or individuals, as the position is that the State, and to some extent communities, are the only actors in the field. Their responsibility is to transpose internationally binding commitments and recommendations into national law and, as in this case, into strategic plans. Concerning the business sector, the Kyoto Mechanisms, especially the Emissions Trading Scheme of the EU, are the most important instruments. Strategic plans function in the background of planning mea- sures and may influence argumentation in those procedures.

The CA provides for following definitions (Sec. 5):

> 3) mitigation of climate change means preventing the generation of anthropogenic green- house gas emissions and preventing them from entering the atmosphere, and also mitigating or eliminating other effects of climate change;
>
> 4) adaptation to climate change means measures taken to prepare for and adapt to climate change and its effects, and measures that can be used for benefitting from the effects of climate change;

Those definitions are in line with the concepts in international climate law (United Nations Framework Convention on Climate Change, UNFCCC, and its pro- tocols). Concerning its legal context, the CA states (Sec. 1.2): "The goals of the Act and of the planning of climate change policy carried out in accordance with it are:

> 1) to ensure the fulfilment of obligations under the treaties binding on Finland and under the legislation of the European Union to reduce and monitor greenhouse gases;
>
> 2) to reduce anthropogenic emissions of greenhouse gases into the atmosphere, to mitigate climate change through national actions, and to adapt to climate change.

In addition to the strategies required by the CA, municipalities and also compa- nies have adopted climate strategies for their internal use, without further legal implications. For instance, the cities in the Helsinki Metropolitan Area approved in 2007 a Climate Strategy to the Year 2030.[2] The strategy is used for development programmes inter alia in order to achieve sustainable consumption of natural resources and improve general material efficiency. The strategy serves also as a basis for land-use planning especially as traffic and energy issues, but also building infrastructures, are concerned.

Point (2) of Sec. 5 of the Climate Act mentioned above is interesting for the esti- mate of how individuals (and non- governmental organizations, NGOs) may enforce their individual environmental rights: "to mitigate climate change through national actions, and to adapt to climate change". The available national provisions for mostly originate from European or international law and as such are directed to authorities. But there is, in my view, a certain demand for imposing the State to allow participation when adopting "national actions". Presently, this is not done by the Climate Change Act as its task is not to interfere with the enforcement of other legal statutes. But this seems not to prevent the authority to consider climate risks in a substantial case both in terms of mitigation and adaptation, especially as there is an environmental obligation behind, for instance reduction of emissions, traffic plans or waste recovery.

Thus, substantially or in terms of combatting global warming, the obligations of the Climate Act are rather weak but perhaps not irrelevant for the future interpretation of substantial laws. The individual has rights towards the state and other communities, especially as the Constitution is concerned. According to Sec. 20 of the present Constitution of 2000 (731/1999) everyone is invested with the rights provided for in the Aarhus Convention,[3] i.e. the right to get information and to participate also when the individual has no legal standing in the matter.[4] In addition, further legislation in the environmental

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[2] https://www.hsy.fi/sites/Esitteet/EsitteetKatalogi/Raportit/Helsinki_Metropolitan_Area_Climate_strategy_summary.pdf. Accessed 22 August 2018.
See also:
"Fortum's climate strategy among the best in the world" - https://www.fortum.com/media/2008/09/fortums-climate-strategy-among-best-world. Accessed 22 August 2018.

[3] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998). See also Hollo et al. (2013), pp. 1–79.

[4] Constitution Sec. 20 para 2: "The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment."

field as well as general rules on administrative procedures invite individuals to participate in procedures, in many cases without proving to be a party to the case.

3. Initiatives in the field of mitigation

3.1 General legislation

There is no tailored mechanism for climate change mitigation for modes of land use and management. Initiatives may be presented to political bodies of the State and the communities (which also have the possibility to use climate strategies and planning measures for enforcement). But national law sets limits to what requirements may be imposed on actors and companies. E.g. environmental permits may not limit the choice of energy sources. In a case concerning zoning, the city had adopted a climate programme, the aim of which was to densify the settlement structure. In addition to other reasons, this climate-based argument justified the rejection of a claim for a review of the zoning plan (Decision of the Supreme Administrative Court 29.12.2017/6894, KHO 2017:202, Finlex Data Bank).

Climate change mitigation presupposes scientific knowledge about the causes of global warming. This again, under the perspective of human activities, means that strategies must tackle the essential sources in a variety of businesses. Some of them are spot-based, mostly industrial and energy-producing units, others are diffuse. Emissions from diffuse sources from agriculture and traffic require for mitigation other mechanisms than point-sources. These are usually economical and voluntary or based on contractual arrangements. Not all sources are caused by human activities; also natural processes emit greenhouse gases, especially methane.

Mitigation measures should be in line with the precautionary principle. The UNFCCC states: “The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost- effective so as to ensure global benefits at the lowest possible cost” (Art. 3.3).

The following shows some examples of Finnish substantial law in relation to climate change mitigation. From the perspective of international climate law, Finland offers a model of how greenhouse gas emissions from forestry may be neutralized. This is based on the strategic approach of international climate law that natural forests are allocated as sinks. Forests store carbon, and they become carbon dioxide sinks when they are increasing in growth or area. About 22.8 million hectares (75%) is under forests in Finland, representing about 10% of the forest area in Europe (215 million ha).[5] The Natural Resources Institute gives following information about forest sinks: “The annual net sink of forests varies annually mainly due to harvesting but the average sink has been about 38 million CO2 equivalent tonnes over the last 10 years. Concurrently the wood products gave a net sink of 2 million tonnes of CO2. Recently the forest sink has covered about 60% of the Finland’s total emissions excluding the emissions and removals of land use and forestry.”[6] The amount of sinks requires often complicated calculations and statistics. Being highly dependent on the national income from pulp industry and

[5] The Finnish Natural Resources Institute “Luke”: https://www.luke.fi/wp-content/uploads/2017/06/finlands-forests-facts-2017-www.pdf.
[6] Ibid.

forestry, Finland pursues at the same time a high percentage of forests as sinks. In this respect, Finland's National Forest Strategy 2025 is loaded with tensions because of the three strategic objectives of the strategy. The visions are: (1) Finland is a competitive operating environment for forest-based business, (2) forest-based business and activities and their structures are renewed and diversified and (3) forests are in active, economi- cally, ecologically and socially sustainable, and diverse use.[7]

The forest strategy strongly focuses on biodiversity and ecological forestry prac- tices but less on mechanisms for the creation of sinks. There is altogether a strategic statement (pp. 27–28):

> Forests as a carbon sink have been a significant means of mitigating climate change in Finland. Whereas the international benchmark level agreed upon for 2020 is 17–18 million tons in carbon dioxide equivalent, the carbon sink has been larger than this as harvesting volume have been lower than those indicated in the National Forest Programme 2015. As wood consumption increases, forests will lose their significance as carbon sinks and empha- sis in climate change mitigation will shift to replacing fossil raw materials by renewable ones, including wood.

In Finland most forests are owned by private persons and organizations. This is reflected in the forest legislation as a relatively strong protection of the actors' inter- ests as owners and producers. It is natural that the national strategy to some extent emphasizes the importance of those interests in the national economy. The forest legislation itself provides for forest management plans, which serve as a basis for harvesting and other measures. In principle, such measures do not need a permit, but they may be interrupted if conditions set by the law are not followed up. Since environmental law, especially the law on nature conservation, has to be respected in forestry as well, the interests of owners and conservationist may collide and cases come up to court. The National Climate Strategy covers forest management as well and it should be taken into account in forestry planning as far as possible. That approach seems to be in line with the principle of sound forestry: forest planning measures may recommend modes of soil treatment and harvesting, which favour for instance the creation of sinks and other mitigating goals. However, if such requirements cause remarkable losses to forest owners, subsidies should be paid. For this purpose the environmental aid of the Common Agricultural Policy (CAP) has been available.

The objective of the Nature Conservation Act (1096/1996) is inter alia to maintain biological diversity and to promote sustainable use of natural resources and the natural environment.[8] This Act does not meet the challenge that climate change would occasionally nullify conservation values and require adaptive measures. Some conservation nature areas are also preserved under the obligation not to interfere in the ecosystem by human activities. It seems however, that the practices con-cerning management of state conservation areas could be adapted to the recommendations of the National Climate Strategy especially as forests and aquatic areas as well as Natura 2000 sites are concerned. One aspect is the protection of genetic resources especially in forests (70% of the area) and swamps (28% of the area).[9] The natural values of marshland are, despite the fact that a great part of marshland is

[7] https://mmm.fi/documents/1410837/1504826/National+Forest+Strategy+2025/197e0aa4-2b6c-426c-b0d0-f8b0f277f332.

[8] See also Act on Managing the Risks Caused by Alien Species (1709/2015).

[9] The concepts of forest and swamp are overlapping.

protected as conservation areas, under threat because of the peat production and also, especially historically, due to drainage of wetland for agricultural purposes.[10] Peat production releases methane and impairs the capacity of swamps to serve as sinks. Individuals in the neighbourhood and NGOs may take action against peat production, but mainly referring to dust and noise. The UNFCCC does not, as it seems, apply to peat production outside forests. However, the Finnish Government has initiated studies in order to find climate-friendly methods for the use or re-use of marshland.

3.2 Climate oriented mitigation

The objective of some laws is tailored for mitigating negative impacts caused by global warming. Some of those laws have their origin in European law, for instance flood risk abatement, forest fire prevention and provisions favouring the use of renewable energy. Waste law, which is based on the concept of life cycle, is relevant for mitigation as well. As an example, I will just mention the Finnish Flood Risk Management Act (620/2010). Maps are prepared for the significant flood risk areas, which may be flooded at different probabilities. The map also shows the potential adverse consequences of such floods. A flood risk management plan is prepared for river basins[11] with one or several designated significant flood risk areas and a significant flood risk area in the coastal area. Water management mechanisms tend to belong both to mitigation and adaptation but this act has mainly a strategic function with anticipation of risks.

The measures that adaptation would need in a real situation are mainly regulated under water and planning law. See e.g. Water Act (579/2011, Ch. 18 Sec. 4): “If exceptional natural conditions or other force majeure event causes a flood or another such change in the water body or in its water conditions that may pose a general hazard to human life, safety or health or causes major damage to private or public interests, the permit authority shall order the state supervisory authority or the party responsible for a water resources management project to undertake the temporary measures necessary to eliminating the danger or minimising the damage. Such an order may be given notwithstanding the provisions laid down in this Act or in regu- lations in permits or decisions issued under it.”

The Flood Risk Act has or may have legal implications, for instance building restrictions or servitudes for flood basins. For this reason participation of landowners and other interested individuals (“everyone”) is required when approving the plan. The authority must reserve everyone the opportunity to examine the proposal concerning the designation of significant flood risk areas referred and the proposal for a flood risk management plan and their background documents. Also, the oppor- tunity shall be given to present one’s opinion on the proposals in writing or electronically.

4. The national adaptation strategy

In the project and environmental legislation adaptive measures are basically dealt with as any other project. There is no comprehensive law concerning climate change adaptation either. However, the approach in case of adaptation seems to be less strategic than in preventive situations because adaptive measures tend to be more case-related and therefore regulated by sectoral rules, for instance by land use planning or building permits. The question is to what extent the climate argument may be

[10] Finland comprises land areas 303,891 km^2, inland waters 34,544 km^2 and sea areas 52,470 km^2. The uplift brings annually 7 km^2.

[11] Main concept of the Water Framework Directive 60/2000/EC.

used in (administrative) cases concerning building on shores, on flood risk management and more. For this purpose adaptation strategies have been adopted.

The National Adaptation Strategy 2022, based on the Climate Act, was prepared by the Ministry for Agriculture and Forestry and approved by the Government 20 November 2014. It is an update of the national strategy 2005. The status of the Government's decision is political, not legally binding but it shall be taken into account by public authorities in their sectoral planning measures. However, the objective to achieve is that the Finnish society as a whole is able to cope with the risks related to climate change and to adapt to changes. For this the strategy does not address public bodies only but sets strategic goals for other actors as well. There are three interim targets. First, adaptation shall become part of planning and operations of business areas and business actors. Secondly, actors shall acquire necessary tools for the evaluation and control of climate risks, Third, research, development programmes, information and education favour capacity of adaptation, adoption of innovative solutions and awareness of climate risks.

The strategy identifies 12 different areas of action. The estimate of global warming in this report bases on the fifth evaluation report of the Intergovernmental Panel on Climate Change, (IPCC), which gives higher numbers for Finland than for the rest of the Globe (between 2.3 and 6 centigrade by 2100). According to the strategy, the main meteorological change would be increasing amounts of rain. For this article the approach would be to examine how the strategy addresses issues concerning decision-making and the role of individuals. As said above, strategies are mostly weak in terms of hard law. But looking at the mentioned objectives of the strategy, some soft law input seems to be feasible. The information and communication approach relates to the legal position of individuals, to their right to be informed and to participate in planning and permit procedures. Even if climate change at present is not in substantial law a ground for legal action, it seems logical to open participa- tion for individuals in cases where operators motivate their projects on climatic grounds. This would be the case especially in issues concerning the use of energy sources (wind, water energy, peat). There are constitutional and administrative reasons for the deservedness of the Government to interfere in the legal system. The legislation related to operations in the climate field has been developed mostly on a sectoral basis. Therefore, the communication between strategic tools and the need to update laws is in my view not efficient yet. However, in the strategy there is a statement to work on: "When preparing and enforcing laws for business sectors the changes of the climate and the climatic risks shall be taken into account."

Let us take two recent examples for the preparation of environmental laws. How are climate aspects been taken into account when adopting the Environmental Pollution Control Act (527/2014) and the Water Act (587/2011), the two most important statutes in the field? The first act applies to activities causing pollution in the environment. The gases provoking global warming are not pollutants and therefore they fall beyond the application area of this act. However, the act states that one objective is to prevent climate change and to support sustainable development. The act itself does not set any climatic targets, wherefore the statement is merely declarative without a right of individuals to bring action unless there is a risk of pollution. The objective of the Water Act does not at least explicitly refer to prevention of global warming. Instead, the act is intended to promote, manage and allocate the use of water resources and the aquatic environment in a manner that is socially, eco- nomically and ecologically sustainable. Though not evidenced in legal practice, the formulation leaves open the question to what extent climate change might be relevant when considering the approval of an application. Large water management projects are commonly known to have relevance for either combatting or

provoking global warming. When considering the conditions for granting a water permit, the concept of "public interest" is decisive. Also, the preparatory works do not indicate whether or to what extent climate issues might be relevant in this discretion. The position seems to be negative.

Considering those comments on legislation in force, one may recognize that in procedures concerning the acts and the liability of the actors concerned there is, eventually, an interest of individuals to participate or to bring action on climatic grounds. The difficulty to proceed lies in the fact that so far individuals would hardly be capable to argue in terms of climate change in a concrete permit matter. As far as strategic instruments are concerned, the present CCA does provide limited possibilities for public participation. This should be improved. Climate law would otherwise consist just of a dialogue between authorities or authorities and operators.

5. Application of the principles of public environmental law

Even if there is no specific legislation on the right of the individual to act in issues concerning climate change, the rules and principles in relation to environmental protection apply at least indirectly in planning and permit procedures, where cli- mate change is one criterion for environmental or social suitability or sustainability. Climate arguments may be raised for instance in permit cases concerning the energy or mining sectors. In a case concerning construction of a water energy plan (Supreme Administrative Court 22.5.2017/2367, KHO:2017:87, Finlex Data Bank), climatic aspects were taken into account as benefits. Essentially, the decision was about the correct implementation of the Water Framework Directive and its environmental goals, not explicitly about the relevance of climate facts.

Despite the position that the Climate Act does not regulate climate goals substantially, the Parliament reserved the option for later considerations. According to the Constitution, citizens do not have a legal ground for obliging the State to reach specific environmental quality targets or to take specific climatic measures. According to the Constitution, the legislator shall enact necessary rulings for the enforcement of environmental liability of everyone.[12] In the end, the individual (and organisations) is merely invested with the procedural right to participate and to appeal against administrative decisions. Cases may be brought by individuals and NGOs to the administrative body and before the administrative court of appeal. The environmental standards or level of technical measures may be reviewed and determined by the court. The range of such discretion is rather broad in environmental law, since laws cannot set precise figures for emissions and nuisances. Case law tends therefore to be influential for the legal practice. The court may take into account or emphasize the relevance of scientific and other information more efficiently than the first administrative instance.

In the future, the role of the Court, especially of the Supreme Administrative Court, will probably be important for the development of climate change aspects in legal decision-making while interpreting permit and planning provisions, including the individuals' right to act as parties. Already today they are invited to present their opinion in permit procedures also without a personal interest. Occasionally citizens have acted for instance in cases dealing with public nature conservation law. Similarly, action

[12] Section 20 para 1: "Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone."

based on global warming could also be initiated, though probably today without success for lack of sufficient or legally relevant evidence.

6. The Position of human rights in Finnish climate law

As to human rights, Finland is party to the European Human Rights Convention, and also the Constitution imposes the State to respect human rights in all decision- making.[13] The authorities do not need to refer to the provisions of the Constitution itself because the substantial and administrative legislation fulfils (or is considered to fulfil) sufficiently the protection of human rights. No cases concerning Finland of the European Human Rights Court are known to me in the field of climate change.

Citizens' rights concerning environmental protection and human rights, includ- ing eventually climate change regulations, range under administrative law. It is unlikely that civil (or criminal) lawsuits based on tort could successfully be brought against authorities or companies on the basis of climate change rulings only. Class actions are not permitted in environmental cases. Climate change may cause environmental damage but in individual cases the causation link would hardly exist because the concept of environmental pollution refers to rather short-term changes in the environment. In civil law, citizens may raise compensation claims for envi- ronmental pollution (Environmental Damages Act 737/1994). The challenge in this context is to prove that the impact of climate change would cause environmental pollution or risks. Suits against public bodies or companies on the basis that they contribute to global warming may not, as it seems, lead to monetary liability unless proof of losses is presented.

In the case that citizens or NGOs consider that planning and other measures foreseen for mitigation or adaptation are not appropriate, claims may be brought before administrative courts (planning and permit authorities at the first instance). There are no decisions so far that such claims or suits were brought against actors or authorities without other dominant aspects than climate change.

7. Future opportunities and challenges ahead

There is so far no pending discussion about the right of individuals to bring action against operators or authorities solely on the ground of global warming. State liability based on tort is theoretically enforceable in cases where international or EU law commitments have not been transposed properly and this fact causes damage to individuals. As supranational climate law is not interpreted to have a direct effect on national law, Finnish law is not at this stage opening the court-way for actions, other than in connection with administrative planning or permit cases. It seems that individuals do not efficiently act as substantially involved parties because the regulations concerning mitigation are mainly based on public interests on safety and land use-planning, rather seldom on pure individual interests. Mitigation again is usually not based on the existence of realized negative impacts but on calculations and expectations. In some cases the situation may be different, especially where indi-vidual interests would be affected as is the case in the flood mitigation.

[13] Section 22: "The public authorities shall guarantee the observance of basic rights and liberties and human rights."

Adaptive measures have probably positive impacts on most involved parties but they still encumber the rights of others. In most cases the right to actively participate in decision-making concerning mitigation and adaptation is guaranteed. But often, in strategic contexts, the participation remains substantially without success if claims are based on climate change arguments only. One opening would be that citizens could efficiently challenge decision-making authorities about the appropriate enforcement of internationally adopted climate goals. It seems however that such a discourse is more political than legal by nature and should be held for instance in the Parliament and its Commissions or in other legislative bodies, not in the court.

The future will show if the climate argument will obtain more weight in administrative decision-making than it is today as a complementary to environmental interests. I assume that Finland would enter this path even without supranational commitments if the court practice decides to incorporate global warming in the rulings of environmental risks. This seems to take time, also depending on how foreign civil actions proceed as examples.

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Waste Act (646/2011)

Water Act (579/2011)

Unfair trading practices in the agriculture and food supply chain – Some remarks on the Hungarian and German regulation

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Abstract

This paper aims to find an answer to whether unfair trading practices (UTPs) in the agriculture and food supply chain are of agricultural law or competition law in nature. Although the expression 'unfair trading practice' suggests that this phenomenon is treated within the framework and toolbox of competition law, beneath the surface other aspects of the issue may appear, if we examine such a specific area like agriculture and food supply chain. To answer the question, the author analyses some national aspects of the new EU directive on UTPs in the agriculture and food supply chain. A brief comparison is provided with regard to the possible direction of implementation in Hungary, in particular regarding the questions of scope ratione personae, scope ratione materiae, listed practices and sanction system. Besides this, a few aspects of the issue are also mentioned in connection with Germany. Before analysing the national questions, the author gives a short overview of the state of competition in the agriculture and food supply chain. In the end, a conclusion is drawn up based on the previous considerations, complementing them with further arguments that are not discussed in detail throughout the study.

Cet article vise à répondre à la question de savoir si les pratiques commerciales déloyales (PCD) dans la chaîne d'approvisionnement agricole et alimentaire relèvent du droit agricole ou du droit de la concurrence. Bien que l'expression "pratique commerciale déloyale" suggère que ce phénomène est traité dans le cadre et la boîte à outils du droit de la concurrence, d'autres aspects de la question peuvent apparaître sous la surface, si nous examinons un domaine aussi spécifique que l'agriculture et la chaîne d'approvisionnement alimentaire. Pour répondre à cette question, l'auteur analyse certains aspects nationaux de la nouvelle directive européenne sur les PTU dans la chaîne d'approvisionnement agricole et alimentaire. Une brève comparaison est fournie en ce qui concerne l'orientation possible de la mise en œuvre en Hongrie, en particulier en ce qui concerne les questions du champ d'application ratione personae, du champ d'application ratione materiae, des pratiques répertoriées et du système de sanctions. En outre, quelques aspects de la question sont également mentionnés en relation avec l'Allemagne. Avant d'analyser les questions nationales, l'auteur donne un bref aperçu de l'état de la concurrence dans la chaîne d'approvisionnement agricole et alimentaire. Enfin, une conclusion est élaborée sur la base des considérations précédentes, en les complétant par d'autres arguments qui ne sont pas abordés en détail tout au long de l'étude.

1. Introduction

This study aims to provide a brief analysis on some aspects of the regulation of unfair trading practices (hereinafter referred to as 'UTPs') in the agriculture and food supply chain. The article concentrates mainly on the Hungarian regulation, but it also mentions some developments in connection with

Germany. The impetus for the analysis comes from a new directive of the European Union[1] which intends to harmonise national legislations with regard to UTPs in agriculture and food supply chain. The Directive introduces a minimum Union standard of protection,[2] since UTPs in business-to-business relations „are addressed by national legislation through different legal instruments, sometimes overlapping and/or leaving issues or practices unregulated".[3] The existence of different regulatory approaches of Member States (hereinafter referred to as 'MSs') are strengthened by the literature. The classification of *Johan Swinnen* and *Senne Vandevelde* differentiates four groups: MSs with no regulation, with private regulation, with 'stretched' legislation and with specific legislation.[4] *Fabrizio Cafaggi* and *Paola Iamiceli* list the MSs into three types: they also have a group for countries with no legislation and specific legislation, but their third group is called limited scope legislation with mainly consumer-type UTP approach.[5] Since „[t]here is a wide-spread consensus that UTPs occur throughout the food supply chain",[6] a legislative act aimed at creating harmonised regulation may contribute to handling a transboundary phenomenon, developing a more complete common market, as well as to economies of scale in administration and transaction cost savings.[7]

In general, this paper seeks to find an answer to whether the regulation of UTPs in agriculture and food supply chain are rather of agricultural law or of competition law in nature. For this purpose, the present article, firstly, gives a general insight into the state of competition in agriculture and food supply chain. Secondly, it mentions some aspects of the inapplicability of competition law when trying to control the UTPs of agriculture and food supply chain. Thirdly, it introduces the sector-specific regulation of Hungary, and sketches out a few aspects of the current German regulation. The paper provides a comparison of the Hungarian Act XCV of 2009 and the Directive with regard to the scope *ratione personae*, scope *ratione materiae*, prohibited practices and sanction system. The paper also presents a few aspects of the possible implementation of the Directive in Germany. Finally, a conclusion is drawn up in connection with both Member States and regarding the main question mentioned above.

2. The state of competition in the agriculture and food supply chain

The general reason for adopting the EU Directive is to alleviate the vulnerability of farmers and small and medium-sized agricultural enterprises to market conditions. The European Parliament, as early as in 2009, raised its concerns with regard to the food supply chain: (a) „large market power pays off in particular in the agri-food sector, given the price inelasticity of agricultural supply on the one hand and consumer demand on the other"; (b) „the trade sector makes use of its market power; including

[1] Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter referred to as 'the Directive).

[2] Directive, Preamble (1).

[3] Study on the Legal Framework covering business-to-business unfair trading practices in the retail supply chain, Final Report, 26 February 2014, p. 69.

[4] Johan Swinnen and Senne Vandevelde: Regulating UTPs: diversity versus harmonisation of Member State rules. In: Federica Di Marcantonio, Pavel Ciaian (eds.): Unfair trading practices in the food supply chain – A literature review on methodologies, impacts and regulatory aspects. Luxembourg: Publications Office of the European Union, 2017, p. 44.

[5] Fabrizio Cafaggi, Paola Iamiceli: Unfair Trading Practices in the Business-to-Business Retail Supply Chain – An overview on EU Member States legislation and enforcement mechanisms. Luxembourg: Publications Office of the European Union, 2018, p. 9.

[6] Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, p. 1.

[7] Swinnen and Vandevelde, 2017, pp. 40–41.

excessive payment deadlines, listing charges, slotting allowances, threats of delisting, retroactive discounts on goods already sold, unjustified contributions to retailer promotion expenses or insistence on exclusive supply"; (c) „both the buying and the selling side of the market tend to be equally concentrated, thus aggravating the distorting effect over the market".[8] Ten years later, the Directive, in its preamble, strengthens these thoughts:

> „Within *the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence. Those imbalances in bargaining power are likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction."*[9]

The basic situation is visible: there are market participants with superior bargaining power and there are those who are vulnerable to the previous ones.

This is not only true for the European Union. All over the world there are voices arguing against the industrialised food system because of its many anomalies. Basically and simply put, we can see the confrontation of two paradigms: an approach based on neoliberal political philosophy and neoclassical economics, which seeks to minimise state intervention in competition,[10,11] and the paradigm of food sovereignty, which seeks to question each and every inherent feature of the industrialised food system, including the dominance of agribusiness, as well as the unfair trading system.[12] The neoliberal food system is the consequence of the ongoing structural transformation of agriculture in Europe and North America, dominated by some huge agri-food businesses.[13] We also cannot forget the rise of supermarkets and hypermarkets in the second half of the 20th century. They have entered the market and totally changed it. Smaller producers are those who suffer the greatest losses, who, in general, may find themselves in a much more difficult commercial environment, given the demands of increased quantities and shorter deadlines.[14]

> „The*[ir] struggle to eke out a living has intensified each decade since 1950, because farmers have been locked into a system of low crop prices, borrowed capital, large debt, high land prices, and a weak safety net. Unchecked corporate mergers and acquisitions have increased the economic pressure, since fewer firms are competing*

[8] Report of the European Parliament of 24 February 2009 on the food prices in Europe, (2008/2175(INI)), articles 12, 15 and 16.
[9] Directive, Preamble (1).
[10] Hope Johnson: International Agricultural Law and Policy - A Rights-Based Approach to Food Security. Edward Elgar Publishing, Cheltenham, 2018, p. 30.
[11] One of the three most important goals of economics (macroeconomics) based on neoliberal political philosophy is financial and trade liberalisation. See more: Joan Martínez-Alier, Roldan Muradian (eds.): Handbook of Ecological Economics. Edward Elgar Publishing, Cheltenham, 2015, p. 154.
[12] Alana Mann: Global Activism in Food Politics - Power Shift. Palgrave Macmillan, Hampshire, 2014, p. 3.
[13] Peter Andree, Jeffrey Ayres, Michael Bosia, Marie-Josee Massicotte (eds.): Globalization and Food Sovereignty - Global and Local Change in the New Politics of Food. University of Toronto Press, Toronto, 2014, pp. 3–4.
[14] Simon Maxwell, Rachel Slater: Food Policy Old and New. Development Policy Review, 2003, 21(5–6), pp. 535–536.

> *to sell the seeds, equipment, and supplies that farmers use every day. At the same time, they have few choices where to sell their products."*[15]

These structural changes go hand in hand with the concentration of market power, which neoclassical economics does not see as a problem to deal with, nor does it seek to capture the anti-competitive consequences of high market concentration and vertical integration.[16] Although national competition laws and the effectiveness of competition enforcement differ significantly state by state, as well as countries are also different in how they deal with typical anti-competitive behaviour in the agriculture and food supply chain, such as cartels, abuses of dominant position or buyer power, but as a result of the development of the food system, the general structural changes causing concentration in the market are having an impact throughout the world. Fortunately, this was recognised in Hungary in time, and was also reflected in adopting Act XCV of 2009 at the level of legislation. It can also be said that not only the voices of neoclassical economists are heard in the European Union, and this is the reason that the Directive analysed in this study may have been adopted.

3. The Hungarian sector-specific regulation of UTPs and the case of Germany

3.1. Hungary

In this chapter the main focus is on the Hungarian regulation of UTPs concerning agricultural and food products, within the framework of which the national rules are compared to the provisions of the new Direcive in some aspects. Both *Swinnen and Vandevelde*,[17] and *Cafaggi and Iamiceli*[18] places Hungary into the group of countries with specific regulation, since – as already mentioned – Act XCV of 2009 regulates the prohibition of unfair distributors' practices against suppliers concerning agricultural and food products (hereinafter referred to as the Act). The Act came into force on 1 January 2010. We can see that the sector-specific UTP-regulation in Hungary has a past of more than then ten years without any regulatory obligation coming from the European Union. The comparison includes the scope *ratione personae*, scope *ratione materiae* and some general features of prohibited practices.

Before analysing the Hungarian regulation, a key question has to be answered: why need specific regulation in connection with the anti-competitive issues of agriculture and food supply chain? Put simply, the set of instruments of competition law is not appropriate for handling this issue.[19,20] Competition law instruments of the European Union, that is, the rules on the abuse of an undertaking of a dominant position (Article 102 TFEU) are not appropriate tools for this specific situation within the food supply chain. The market gets more and more concentrated. „Consolidation of food supply is increasing and more evident at every step of the food chain, from farm to fork." […] Of particular

[15] Wenonah Hauter: Foodopoly - The Battle Over the Future of Food and Farming in America. The New Press, New York, 2012, [e-book].
[16] Valeria Sodano, Fabio Verneau: Competition Policy and Food Sector in the European Union. *Journal of International Food & Agribusiness Marketing*, 2014, 26(3), p. 162.
[17] Swinnen and Vandevelde, 2017, p. 44.
[18] Cafaggi and Iamiceli, 2018, p. 9.
[19] Firniksz Judit and Dávid Barbara: A versenyjog határterületei: a vevői erő régi és új szabályai. *Magyar jog*, 2020, 67(5), p. 277.
[20] Victoria Daskalova: The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks? *Journal of European Competition Law & Practice*, 2019, 10(5), p. 284–285.

interest is the consolidation that is taking place at the level of supermarkets and retailers."[21] Nevertheless, based on the market shares of food retailers the conditions required for the applicability of Article 102 TFEU are not fulfilled. Not only the EU rules, but also the national rules on the abuse of the dominant position are not suitable, hence *sui generis*, specific norms are needed in order to handle the imbalances of the food supply chain, because the restrictive and anti-competitive practices of giant food enterprises and retailers are not covered by the toolbox of classical competition law.

With regard to the scope *ratione personae*, there are a few differences that have to be mentioned. One difference is that there are no turnover thresholds determined by the Hungarian Act, while the Directive restricts its personal scope by setting up a cascading system based on the annual turnovers of suppliers and buyers.[22] The assessment method of turnover thresholds differs from the approach of EU competition law, since the latter one „relies on market share thresholds combined with a qualitative analysis of market power".[23] As stated above, the Hungarian Act does not even have an assessment method of turnover thresholds, nor does it limit its scope as the proposal of the Directive would have done. According to the proposal, the Directive would have applied only to certain unfair trading practices which occur in relation to the sales of food products by a supplier that is a small and medium-sized enterprise (SME) to a buyer that is not a small and medium-sized enterprise.[24] Although the Hungarian Act means a unique solution regarding the lack of (economic) assessment method, this does not raise any problem. Since the Directive aims minimum harmonisation, the Hungarian Act can maintain its current approach of not applying the assessment method of neither turnover and market thresholds, nor differentiating between SMEs and non-SMEs. As can be seen, in this aspect the personal scope of the Hungarian Act is broader than of the Directive, but this has no future implications.

Nevertheless, there is an aspect of scope *ratione personae* where the Hungarian regulation shall be brought into conformity with the Directive. The Hungarian Act only prohibits the unfair trading practices of distributors (retailers) against suppliers. In contrary, the Directive covers the unfair trading practices of all actors of food supply chain: not only of the distributors, but also of the wholesalers and processors against suppliers. It is already evident, if we look at their terminology. The Directive uses the word 'buyer' that includes any natural or legal person who buys agricultural and food products.[25] The Hungarian Act, as its title implies, refers to the practices of distributors, and covers only the relations of retailers and their direct suppliers.[26] This shall be amended in accordance with the Directive, because suppliers are not protected from the anti-competitive practices of all kinds of agents in the food supply chain based on the Hungarian regulation.

It can be concluded that the personal scope of the Hungarian Act is broader in one aspect (no turnover thresholds) and narrower in another one (covering only the practices of retailers) than of the Directive. Given the minimum harmonisation approach, the Hungarian Legislator does not have to

[21] Fair Trade Advocacy Office: *EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links*, February 2019, Brussels, p. 23.

[22] Directive, Article 1, 2. For example: This Directive applies to certain unfair trading practices which occur in relation to sales of agricultural and food products by suppliers which have an annual turnover not exceeding EUR 2 000 000 to buyers which have an annual turnover of more than EUR 2 000 000; suppliers which have an annual turnover of more than EUR 2 000 000 and not exceeding EUR 10 000 000 to buyers which have an annual turnover of more than EUR 10 000 000; etc.

[23] Daskalova, 2019, p. 282.

[24] Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, Article 1, 2.

[25] Directive, Article 2, 2.

[26] Firniksz and Dávid, 2020, p. 279.

change the Act's scope *ratione personae* in connection with the turnover threshold determined by the Directive, but has to expand the protection of suppliers even against the wholesalers and processors.

The scope *ratione materiae* is also different. The Hungarian Act refers to Article 2 of the regulation no. 178/2002 on laying down the general principles and requirements of food law, which says that 'food' (or 'foodstuff') means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.[27] To this definition the Act adds that those products fall under its scope *ratione materiae* that – in order to be sold to the final consumers – do not require further processing.[28] According to the Directive, the scope covers agricultural and food products, which are products listed in Annex I to the TFEU as well as products not listed in that Annex, but processed for use as food using products listed in that Annex.[29] There are several differences in practice. Only two of them are mentioned here. For example, the Directive's scope covers all live animals, meanwhile the Act's scope does not cover live animals, unless they are prepared for placing on the market for human consumption. The Directive's scope covers unmanufactured tobacco and tobacco refuse, although the Act's scope does not cover tobacco and tobacco products. The conclusion is that, in order that the Hungarian Act be in accordance with the Directive, the Hungarian Legislator would need to change the Act's scope *ratione materiae*.

Concerning the most important part of the regulation, we can explore significant differences in connection with the list of unfair trading practices. In the Directive there are 15 practices listed: 9 of them are on the black list, so they are prohibited *per se*,[30] 6 of them are on the grey list, which are prohibited, unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer.[31] The Hungarian Act does not apply a differentiation like this. If we look at the way of formulation of the Directive's and the Act's wording, we can conclude that the Directive is formulated in a much more general way than the Hungarian Act. The regulation of the latter one is nuanced, more detailed with its 28 different unfair distributors' practices.

Without providing a detailed analysis of the comparison of listed practices, we can say that there are three practices in the Directive that cannot be corresponded to any of the unfair practices of the Hungarian Act. These are the following: (a) the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council;[32] (b) the buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation;[33] (c) the buyer requires compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products despite the absence of negligence or fault on the part of the supplier.[34]

These practices shall be added to the Hungarian Act in order that it be in accordance with the Directive's minimum harmonisation approach. Although if we were permissive, a listed practice in the

[27] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Article 2.
[28] Act CXV of 2009, 2. § (2) d).
[29] Directive, Article 2, (1).
[30] Directive, Article 3, 1.
[31] Directive, Article 3, 2.
[32] Directive, Article 3, 1. (g).
[33] Directive, Article 3, 1. (h).
[34] Directive, Article 3, 1. (i).

Hungarian Act may be appropriate for the third, above-mentioned practice (c). According to the Hungarian Act: it is unfair for distributors to require the use of services that are not requested by the supplier or that do not serve his/her interests, or to charge the supplier for these services based on any (legal) title.[35] One of the elements of the second practice, 'the threatening' appers in a practice listed in the Hungarian Act, nevertheless the prohibition in the Hungarian regulation refers to cases when the different types of threats take place in order that the distributor could reduce the purchase price despite the protest of the supplier.[36] In my opinion, all the other 12 practices listed in the Directive can be found in some form in the Hungarian Act, therefore only minor amendments are needed in the latter one.

Concerning the sanction system, the Directive says that the Member States shall ensure that each of their enforcement authorities has the necessary resources and expertise to perform its duties, and shall confer on it the power to impose, or initiate proceedings for the imposition of, fines and other equally effective penalties and interim measures on the author of the infringement, in accordance with national rules and procedures. There are five other powers which are needed to be ensured for the enforcement authorities in favour of the efficient enforcement.[37] The Member States can establish their own sanction system that is suitable for their legal traditions, i.e. different sanction systems can coexist next to each other in the Member States. Let us look at a few characteristics of the Hungarian Act's sanction system.

It can be divided into two parts: first, if the enforcement authority, i.e. the National Food Chain Safety Office (an administrative body) finds an infringement, it may inform the trader before making a final decision that he can make a commitment statement within ten days to bring his conduct into line with the provisions of the law; second, if this does not happen, the enforcement authority imposes a fine. During the examined nine years, 206 infringements took place on the basis of public data: the majority of these can be considered as violations of substantive law, which are covered by the Act, Section 3(2), and there are some cases of procedural violations, typically failure to provide information. With regard to the total number of cases, we can conclude that the procedures were closed with the imposition of a fine in about 70% of the cases, while a commitment statement was made in about the remaining 30% of the cases. The data show that judicial review proceedings have been initiated in respect of 45 administrative proceedings, representing approximately 22% of cases. If we look at the level of fines imposed, it is clear that 2011 and 2012 stand out, as more than one billion forints of fines were imposed in both years. In 2013, it fell to approximately HUF 215 million, and only year 2015 (HUF 224 million) and 2016 (HUF 227 million) could approach it. In 2014, a record low total amount of fine of HUF 6.5 million was imposed. Starting from 2017 (HUF 81 million), a slow increase can be observed, as both 2018 (HUF 108 million) and 2019 (HUF 166 million) exceeded the previous years.[38]

All in all, there are some changes needed in order to implement the EU Directive appropriately, but we can say that the fundamentals of the Hungarian Act are adequate. The enforcement mechanism works with the predominant feature of applying financial sanctions, i.e. fines. The EU Directive is not going to bring significant transformation in the Hungarian sector-specific regulation of unfair trading practices in the agricultural and food supply chain.

3.2. Germany

If we look at the regulation of Germany with regard to UTPs, a different approach can be recognised than of Hungary. Although *Cafaggi and Iamiceli* place Germany into the group of countries with specific

[35] Act CXV of 2009, 3. § (1) ec).
[36] Act CXV of 2009, 3. § (1) x).
[37] Directive, Article 6.
[38] Based on public data from https://portal.nebih.gov.hu.

legislation, they also note that „UTPs have been addressed by stretching the scope of competition law beyond the boundaries of Article 102 TFEU, and applying the concept of abuse to economic dependence or superior bargaining power."[39] In this regard, *Swinnen and Vandevelde* do not consider stretching the existing legislation to be specific legislation; they set up a distinct group of countries under the expression of 'stretched existing legislation'. It consists of not only Germany, but also Cyprus, Finland, Austria and Greece.[40] Without arguing for or against any of the classification above, it is manifest that both papers refer to the provision of § 20 (2) of *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), which regulates relative market power and superior bargaining power. It is „the situation in which an undertaking has a market power not with respect to all other market participants (like in the case of a dominant position), but only with respect to another undertaking that economically depends on it."[41]

Although there is no separate act in Germany to regulate UTPs in agriculture and food supply chain, there is a referrence to food products in the above-mentioned paragraph of GWB. Companies with superior market power compared to small and medium-sized competitors may not use their market power to directly or indirectly hinder such competitors inappropriately. An unreasonable hindrance within the meaning of this sentence exists in particular if a company offers food products below purchase price, unless this is objectively justified in each case.[42]

Without further analysis of current German legislation on UTPs of agriculture and food supply chain, it can be clearly stated because of the lack of specific legislation that the new Directive is going to bring significant changes within the regulation of the issue in Germany. This argument can be demonstrated by the fact that the implementation of the Directive is going to take place through a remarkable amendment of *Agrarmarktstrukturgesetz* (AgrarMSG).

According to the draft bill of the amendment,[43] *Agrarmarktstrukturgesetz* is going to be changed substantially. If accepted, it will be called *Gesetz zur Stärkung der Position des Erzeugers in der Lebensmittellieferkette*, i.e. Act on Strengthening the Position of Producers in the Food Supply Chain. Its abbreviated title will be *Lebensmittellieferkettengesetz* (LmlkG), i.e. Food Supply Chain Act.[44] The most relevant change for the issue analysed here is the new Part 3 of the AgrarMSG, which will include the provisions of the Directive nearly word by word. The draft bill also declares that the provisions of GWB, in particular its paragraphs 19 and 20 (abuse of dominant position and superior bargaining power), as well as the functions, powers and competences of *Bundeskartellamt* remain unaffected.[45] The enforcement authority will be the *Bundesanstalt für Landwirtschaft und Ernährung*, i.e. the Federal Institute for Agriculture and Food.[46]

Two organisations, *Bundesvereinigung der Deutschen Ernährungsindustrie*[47] and *Deutscher Bauernverband*[48] have expressed their opinions on the draft bill. Without presenting their opinions in more detail, it is enough to mention that both organisations recommend further tightening of the rules, for

[39] Cafaggi and Iamiceli, 2018, p. 9.
[40] Swinnen and Vandevelde, 2017, p. 44.
[41] Study on the legal framework covering business-to-business unfair trading practices in the food supply chain. Final report, Prepared for the European Commission, DG Internal Market, DG MARKT/2012/049/E, 26 February 2014, pp. 47–48.
[42] GWB, § 20 Absatz 3, Nummer 1.
[43] Referentenentwurf des Bundesministeriums für Ernährung und Landwirtschaft: Entwurf eines Zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes.
[44] Ibid., Artikel 1, Number 1-2.
[45] Ibid., Artikel 1, Number 16.
[46] Ibid., Artikel 1, Number 7.
[47] Bundesvereinigung der Deutschen Ernährungsindustrie: Stellungnahme zum Referentenentwurf eines Zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, Berlin, 6 August 2020.
[48] Deutscher Bauernverband: Stellungnahme zum Referentenentwurf eines 2. Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, Berlin, 6 August 2020.

example the practices of the grey list be handled as the practices of the black list, that is, the grey-list practices should also be prohibited *per se*. They emphasise that the word by word implementation is not enough, because the agreements appearing in grey-list practices are not drawn up as a consequence of the mutual consent of the contracting parties.

4. Conclusion

Our initial question of whether the regulation of UTPs in agriculture and food supply chain are rather of agricultural law or of competition law in nature can be answered as follows. After the adoption of the new EU directive, UTPs of agriculture and food supply chain are more in balance with the approach and characteristics of agricultural law than of competition law.

If we look at the case of Hungary, it can be seen that the Hungarian Legislator, ten years earlier than the adoption of the Directive, created a separate and distinct act, the Act CXV of 2009 which cut out the issue of UTPs in the food supply chain from the classical framework of competition law and from the competences of competition authority, and it authorised the National Food Chain Safety Office to act on the cases of unfair distributors' practices. The uprooting can also be strengthened by the literature: one of the Hungarian authors has characteristicly declared that the Act CXV of 2009 is not placed within the „territory" of competition law.[49] It is manifest that the Act does not apply any established assessment method known from the toolbox of competition law. Tearing out the UTPs of agriculture and food supply chain from the world of competition law is also stated with regard to the Directive. According to *Victoria Daskalova*: „it [the Directive] is not a competition law solution".[50]

Through the example of Germany and its new draft bill, the same appears: a separate act (other than the traditional GWB) will regulate the UTPs of agriculture and food supply chain, and not a traditional enforcement authority of competition law will be authorised for dealing with these specific cases, but an authority of agricultural law, i.e. *Bundesanstalt für Landwirtschaft und Ernährung*.

If the expression 'unfair trading practices of agriculture and food supply chain' does not suggest that the phenomenon is treated within the framework of competition law, the question arises: on what grounds can we declare its agricultural law nature? Simply put, on the functional notion of agricultural law *(funktionaler Agrarrechtsbegriff*): according to this approach, agricultural law includes all provisions which have specific effects on agriculture (and forestry), not only if the given provision originates from a field of law characterised by „typical" agricultural interests, but also if the field of law in question is dominated by administrative purposes other than agricultural ones.[51] The main interest and goal of the Directive is „to reduce the occurrence of [unfair trading] practices which are likely to have a negative impact on the living standards of the agricultural community".[52] It is also enshrined in the primary law of the European Union: one of the main objectives of the common agricultural policy is „to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture".[53] Neither can it be forgotten that according to the Council Regulation No 1184/2006, „one of the matters to be decided *under the common agricultural policy* is whether the rules on competition laid down in the Treaty are to apply to the production of,

[49] Kocsis Márton: Vevői erő – a hazai szabályozás 8 éve és európai uniós kitekintés. *Versenytükör*, 2014/1, p. 66.
[50] Victoria Daskalova: Counterproductive Regulation? The EU's (Mis)adventures in Regulating Unfair Trading Practices in the Food Supply Chain, *TILEC Discussion Paper*, September 2018, p. 47.
[51] Roland Norer (ed.): Handbuch des Agrarrechts. Wien: Springer, 2005, p. 4.
[52] Directive, Preamble (1).
[53] Treaty on the Functioning of the European Union, Article 39, 1. (b).

and trade in, agricultural products".[54] Without any doubt, unfair trading practices of the agriculture and food supply chain, which at first sight seem to be of competition law in nature, are fully connected to the functional notion of agricultural law and therefore their scientific elaboration shall be performed by agricultural law experts.

Finally, another important aspect has to be mentioned. Why classify the legal relations in connection with food products to agricultural law and not to food law? Although according to the Regulation No 178/2002 of the EU, food law shall pursue, *inter alia*, the general objective of fair practices in food trade,[55] there are one more argument to be considered. *Ines Härtel and Dapeng Ren* note that „[a]gricultural law refers to the legal framework for agriculture", and „[a]griculture is linked closely to the agribusiness", meanwhile „food law refers to […] the stages of distribution".[56] Nevertheless, it cannot be forgotten that „[t]his legal separation of spheres has been losing its clarity in the face of more complex interfacing in the field of foodstuffs (agricultural products and further processed foods)".[57] Given that agricultural law and food law are strongly intertwined, as well as that the main impetus behind the regulatory need is helping the agricultural community against agribusiness which is linked closely to agriculture, we can look at the UTPs of agriculture and food supply chain as a phenomenon of agricultural law in its nature. This concept of agricultural law also includes food law and thus the trade of food products. However, if one would like to also emphasise the role of food law because the functional notion of agricultural law is not accepted exclusively in this regard, we may formulate our conclusion by fully taking over the terminology of *Härtel and Ren*: the UTPs of agriculture and food supply chain are dominantly of *agri-food law* in their nature, and to a much lesser extent, of competition law.

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[54] Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, Preamble (2).
[55] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Article 5, 1.
[56] Ines Härtel and Dapeng Ren: Agri-Food Law: Term, Development, Structures, System and Framework. In: Ines Härtel (ed.): *Handbook of Agri-Food Law in China, Germany, European Union. Food Security, Food Safety, Sustainable Use of Resources in Agriculture*. Springer International Publishing, 2018, p. 3.
[57] Ibid., p. 2.

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