

# LAW, ECONOMY AND IDEOLOGY IN THE WESTERN DEMOCRACIES TODAY: A TYPICAL CARROT AND STICK INTERACTION

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## **Abstract**

*The official anti-Covid-19 policies and the backlash they sparked from a substantial portion of the population in both the EU and USA might be seen as part of a long series of events which highlight a growing polarization amongst the citizens of the Western democracies today, along ideological fault lines, regarding the extent of the executive powers, the individual freedoms versus the common good, the environmental protection versus the economic realities etc. In part, this polarization arises, in our opinion, from the unbalanced relationship between ideology, economy and law. The present paper endeavours to examine some facets of this relationship, presenting the current tensions between ideology, on one hand, and law and economy, on the other, as an example of a typical carrot and stick approach, which relegates the law to an ancillary, strictly technical role. To this purpose, several cases will be considered, such as the European Green Deal, the immigration (a common and hotly debated topic in the EU and USA today) and the anti-Covid vaccination policies. We will attempt to show that, far from being a mere avatar of a "stick" within the framework of the Western democracies, the law could and should offer solutions to the pervasive divisiveness in our society, by re-evaluating concepts such as sovereignty and democratic representation, and in doing so, acting as a social glue, where economic incentives or ideological tenets are bound to fail.*

**Keywords:** *sovereignty, government powers, immigration, The European Green Deal, economy, vax mandate, anti-Covid-19 vaccination policy, UE regulations.*

**JEL Classification:** K10, K20

*"We are ready to accept almost any explanation of the present crisis of our civilization except one: that the present state of the world may be the result of genuine error on our own part and that the pursuit of some of our most cherished ideals has apparently produced results utterly different from those which we expected."*  
(Friedrich A. Hayek)<sup>2</sup>

## **1. Introduction**

Polish border guards using water cannons against aggressive migrants who attempt to force their entry from Belarus; the Hungarian government building walls and barbed wire fences at the border with Croatia and Serbia; Polish miners protesting against European measures aimed at reducing net carbon emissions; public and private employees in the USA, dismissed for refusing the anti-Covid vaccine: all these are not mere random signs of our times, but rather consequences of planned policies undertaken by the Western democracies in order to accomplish a series of ideologically pre-determined objectives, which antagonise, by their practical effects, the very citizens of these countries.

Generous in their purpose, but often lacking in democratic legitimacy, such policies are characterised by a double conditionality: the legal framework, on one hand, and the economic content, on the other. Problems arising in this context include, among others: an increase in the executive powers by frequent use of delegated legislation, which undermines the legislative authority; individual freedoms balanced against the public interest; the protection of the environment versus economic realities. While the causes of these problems are varied, the polarization in our society along ideological stances such as pro- and anti-immigration, pro- and anti-vaccine, pro- and anti-climate change, also stems, in our view, from the unbalanced relation between three of the basic components of the social environment: namely, law, ideology and economy.

**Clarifications with regard to the purpose of this paper.** The present article purports to highlight, in a non-exhaustive case-centred approach, some avatars of this relation, by framing the current tensions between ideology, on one hand and law and economics, on the other hand, as a

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<sup>2</sup> Hayek, Friedrich A., *The road to serfdom*, Routledge Classics, 2001, p. 11.

classical example of a carrot and stick approach, whereby the law is being relegated to a mere ancillary, technical role. The cases to be analysed refer to the recent measures aimed at curbing immigration adopted by a number of Western states (a problem shared by both the EU and the USA), the anti-Covid vaccination policies and the measures intended to combat global warming (with focus on the European Green Pact and the policies adopted by the Biden administration).

We will endeavour to prove that, far from being a mere incarnation of the “stick” in today’s Western democracies, the law can and should continue to accomplish its double function, as a social glue and social remedy: in the medium and long term - by providing viable solutions to stop social divisions, where economic incentives and ideological dogmas are doomed to fail, through the restoration of concepts such as sovereignty and democratic governance; in the short term - by offering corrective solutions to address power imbalances between the government and the governed, through judicial review of the legislation by ordinary or constitutional courts.

**On working definitions.** Though most of us intuitively grasp the concept of ideology, a formal definition is no simple matter. In order to ensure a rigorous methodological process, we deem necessary a number of conceptual clarifications, to act as a working definition adapted to the purpose of the article, as outlined above.

In his seminal work “The End of Ideology” (1960), Daniel Bell (1919-2011), a renowned American sociologist and professor at Columbia and Harvard Universities, highlighted how difficult it was to define the concept of ideology. This task was rendered even more difficult because of its prestigious but controversial scholarly pedigree, which started at the end of the 18<sup>th</sup> century in France, was enriched by Hegel’s philosophy, classical liberalism and sociological school, then was further transformed by the left-wing socialists Marx and Engels, and afterwards by the far right German national socialism, finally reaching modernity with an eclectic content. In order to define the concept, Bell adopts the distinction operated by Karl Mannheim between a *particular ideology* (common values and principles held by a person balanced against its purposes and social interests) and a *total ideology*. According to Bell, *a total ideology* “is an all-inclusive system of comprehensive reality, it is a set of beliefs, infused with passion, and seeks to transform the whole of a way of life. (...) Ideology is the conversion of ideas into social levers.”<sup>3</sup>

While Bell’s predictions about the disappearance of the old ideologies, caused by the failure of Marxism and Nazi socialism, as well as by an allegedly established consensus about the role of the state in modern societies, have not been confirmed by today’s realities, it is our view that his definition of ideology retains its usefulness. Furthermore, compared to the definitions found in regular dictionaries, it offers the advantage of unequivocally highlighting the *active* side of ideology – a system of values and principles *oriented towards obtaining pre-determined social purposes*. In the present article, the concept of ideology is used in consideration of the above-mentioned definition.

**What does the carrot and stick approach mean?** The expression “carrot and stick” implies the use of both incentives (carrots) and deterrents (sticks) in order to induce a desired behaviour. Such an approach is linked to the motivation of human behaviour and precedes by far the creation of a formal theory consecrating it or the public attestation of the said expression, in the 19<sup>th</sup> century Britain.

For instance, the well-known English philosopher and legal scholar Jeremy Bentham (1748-1832), who defined the principle of social utility as “the greatest happiness for the greatest number”, placed at the centre of his philosophy the assumption that human behaviour is governed by the quest for pleasure and avoidance of pain. Moreover, he sought to enact his ideas through a series of legislative proposals with carrot and stick approaches for the English criminal and administrative legal system.<sup>4</sup> In modern times, the carrot and stick approach has been implemented particularly in the field of human resource management of companies, under the term of “transactional or

<sup>3</sup> Bell, Daniel, *The End of Ideology*, Harvard University Press, 1988, p. 399-400. For a detailed presentation of the origins of the term <ideology>, see also Lichtheim, G., *The Concept of Ideology*, „History and Theory”, Vol. 4, no. 2, p. 164-195, 1965; doi:10.2307/2504150.

<sup>4</sup> Georgescu, Ștefan, *Filosofia dreptului. O istorie a ideilor din ultimii 2500 de ani (Philosophy of law. A history of ideas for the past 2000 years)*, All Beck, Bucharest, 2001, p. 110-116.

cooperative leadership.”<sup>5</sup> International diplomacy, as well as domestic legal policies both recognise and apply it, with various degrees of success.

Like all human ideas, carrot and stick strategies have their limitations. A criticism often levelled at these strategies, stemming mainly from the economic doctrine<sup>6</sup>, in connection to the relationship between employer and employee, is the fact that it might decrease intrinsic motivation, as well as productivity, diminish creativity, encourage fraud, unethical and easy choices (shortcuts), cause addiction and foster short-term thinking.

In our analysis, we shall endeavour to highlight the drawbacks of the carrot and stick approaches, with regard to the cases considered below.

## **2. Recent measures adopted by some Western states to stop illegal immigration: on border walls and beyond - legal, economic and ideological aspects**

### **2.1. General background**

Illegal immigration is a problem common to both the EU and the USA. At political and legislative level, a distinction is drawn between migrants and refugees, two categories with a different legal status<sup>7</sup>, the first one being motivated by economic reasons and the second one, by fear of armed conflicts or persecutions. A problem shared by today's Western democracies is the abuse of the refugee status and its misappropriation by economic migrants, for the sake of the benefits it confers.

In Europe, immigration has developed into a crisis from 2015 onwards, following the escalation of the war in Syria and other conflicts in the Middle East, when approximately 1,3 million people, mostly Muslim, have flooded EU borders, claiming asylum as refugees.<sup>8</sup> In the USA, a similar crisis erupted in 2014, when migrants, especially women and unaccompanied children began to arrive in the USA from states like Honduras, El Salvador and Guatemala. In some research studies<sup>9</sup>, it has been pointed out that the outbreak of this unwelcomed situation might also have been encouraged by the ambiguous and lax US immigration policies during the Obama administration.

The response to these crises has varied according to the geographical location and the financial resources of the concerned states. Ideology has also played an important part in it, since policies aimed at stopping immigration differ significantly depending on the political leanings of the governments. We will briefly consider such aspects, after the presentation of the legal framework applicable to border security and, related to this issue, to the building of border walls.

At EU level, immigration policies are circumscribed by the obligation to respect human rights, an obligation enshrined in the EU constitutive treaties. With regard to individual member states, opinions on this topic are nuanced and, in some Central and Eastern European countries, openly opposed to the EU welcoming policies. The increase in the number of terrorist attacks, the difficult integration process of the migrants into the secular democratic societies, the economic pressure caused by the allocation of financial aid to the refugees and, as importantly, a growing discontent of the citizens have determined some states to adopt drastic measures in order to stop illegal immigration. Hence, the seemingly outdated idea of constructing insurmountable physical barriers at the border – or, to apply a facetious twist to a famous phrase, *ecce murus!* (Behold the wall!)

<sup>5</sup> Frangieh, Maria, Rusu, Daniel, *The Effect of the Carrot and Stick Transactional Leadership style in Motivating Employees in SMEs*, „Review of International Comparative Management”, Volume 22, Issue 2, May 2021, p. 243-252.

<sup>6</sup> Pink, Daniel H., *Drive: The Surprising Truth of What Motivates Us*, Riverhead Books, 2011, *apud* Jaakko Hartikainen, August 28, 2019, online reference at: <https://www.tietoevry.com/en/blog/2019/08/we-all-know-that-carrot-and-stick-model-is-outdated/>, consulted on 1.10.2021.

<sup>7</sup> <https://www.unhcr.org/ro/380-refugiat-sau-migrant-cum-este-corect-punctul-nostru-de-vedere.html>, consulted on 1.10.2021.

<sup>8</sup> <https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>, consulted on 1.10.2021.

<sup>9</sup> <https://migration.ucdavis.edu/mn/more.php?id=3929>, consulted on 1.10.2021.

## 2.2. The legal framework regarding the powers over immigration and border security issues

The measures adopted to protect and strengthen the national borders are a direct expression of state sovereignty. The borders are defended against invasions, enemies and undesirables and the legal framework concerning the state border is subject to international and domestic regulations, with certain peculiarities in the US as a federal state, or in the EU.

**The European Union.** The competences of the EU Member States in these matters are regulated by the Treaty on the Functioning of the European Union (TFEU) and the Treaty of European Union (TEU) and fall mainly into two categories: exclusive or shared. According to Article 4 Paragraph (1) and (2) TEU, Member States have exclusive competences on border security.

*Article 4 (...) (2) The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*<sup>10</sup> [emphasis added]

The immigration matters fall within the shared competences pertaining to the area of freedom, security and justice, as stated by Article 4 (2) and Articles 78 and 79 Title V of TFEU.<sup>11</sup>

Article 78 TFEU sets forth in Paragraph (3), in a manner we consider discretionary and imprecise, the procedure to be followed if an emergency situation might arise.

*Article 78 (3) In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament* [emphasis added]

The actual application of the above mentioned mechanism has triggered complaints from countries such as Poland and Lithuania, which requested, but did not receive financial aid for securing the borders against the wave of immigrants deliberately channelled by Belarus towards the EU borders, as retaliation for the sanctions imposed in July 2021.

**The United States of America.** The power to legislate on immigration and naturalisation (citizenship) belongs to the Congress, as legislative body, and is regarded as a plenary and unconditional power, even if its source remains uncertain.<sup>12</sup> The legislation adopted by the Congress is then implemented by the federal government agencies, the legal instruments, either statutory or delegated, being subject to judicial review. In a number of cases, the courts have directly influenced the immigration policy through their reasoning: for instance, in cases such as *INS v. Cardoza-Fonseca* (Sup.Ct.1987) or *INS v. Chadha* (Sup.Ct.1983), where the state was represented by the INS – the Immigration and Naturalization Service, the main federal agency responsible for the enforcement of the immigration regulations between 1933-2003.

With respect to the powers regarding the border security, both the proponents of the exclusive federal powers and those who support the residual powers of the States invoke the US Constitution, namely the Tenth Amendment, which sets forth that: *“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”*<sup>13</sup>

As in the case of the shared competences within the EU, the shared powers in the USA work as long as there is a convergence of the federal administration’s and the States’ interests. The delicate constitutional balance between them is further complicated when the political leanings of the federal administration are radically different from those of the elected administration of the States. The public discourse and the measures adopted by the Trump administration between 2017 and 2020 and, from

<sup>10</sup> TUE <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN>, consulted on 1.10.2021.

<sup>11</sup> TFUE <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF>, consulted on 1.10.2021.

<sup>12</sup> <http://hrlibrary.umn.edu/immigrationlaw/chapter2.html>, consulted on 1.10.2021.

<sup>13</sup> <https://constitution.congress.gov/constitution/amendment-10/>, consulted on 1.10.2021.

January 2021, by the Biden administration, reflect to the highest degree the ideological polarization and the practical consequences of social, legal and economic order, which the two completely opposed orientations have on issues such as immigration and border security.

### 2.3. Ideology – should we build walls or bridges?

The need to build defensive walls has been felt from times immemorial, in different geographical spaces: the wall is both a physical barrier that protects against the enemies, the undesirables (the Hadrian Wall, the Antonin Wall, Valul lui Traian, the Great Chinese Wall etc.) and a symbol of delineation between cultures, civilizations, mentalities. In his well-known play “Birds”, Aristophanes expressed this idea as far back as 414 B.C.: “We don’t learn that from friends. But enemies/ can force that truth upon us right away./ That’s why cities learn, not from their allies,/ but from enemies, how to build high walls,/ assemble fleets of warships - in that way,/ their knowledge saves their children, homes, and goods.”<sup>14</sup> Naturally, the problem which arises in connection to the building of defensive walls bears upon the definition of the enemy – precisely the question put forth today by the opponents of wall building as a barrier against illegal immigration.

Conversely, the idea of “building bridges, not walls” is much more recent, stemming largely from the movements for social equality in the US, but also from the human rights activism in Europe. Its formulation has been frequently credited to Martin Luther King Jr., though most probably it has been coined for the first time at the beginning of the 20<sup>th</sup> century by the American Baptist pastor and legally trained freemason, Joseph Fort Newton.

In **Europe**, the experience of the WW 2 and the division of the continent in two political blocks - the democratic, free one and the Eastern, communist Block - have turned the walls into a painful symbol of the fractured European identity. Representative for this division was the Berlin Wall which, after the democratic upheaval that shattered the communist regimes in Eastern Europe in 1989, has become a symbol of a past which should never be repeated. The project of a United Europe reflects this desire; the experience of the past 50 years of separation between the East and the West have led to the very foundations of the European political architecture after 1989 being built upon the respect for human rights and democratic values, as stated by most European law statutory sources. This historical experience might account, in part, for the official position of the EU on the migrant crisis at the Belarus border.

In the relevant scholarly doctrine, both the legal basis and the actual mechanism for promoting human rights at international level by the EU have been in depth analysed, with the emphasis on the importance of inserting a “human rights clause” in international treaties, commercial or financial aid agreements signed with contracting parties from Africa – Pacific – Caribbean Regions, Latin America etc. This clause “(...) provides that, in case of infringements of human rights or liberties, the EU may suspend its technical, financial or commercial aid granted to the Beneficiary Party”.<sup>15</sup>

The migrant crisis at the Belarus border is the result of this policy of active promotion of human rights, the EU imposing economic sanctions on Belarus, after a string of violations of basic democratic principles by the Lukashenko regime, which have culminated in the hijacking of the Ryanair Flight 4928 in May 2021 and the arrest of the political opponent Roman Protasevich.<sup>16</sup> The political and economic sanctions, which have started with entry restrictions into the European air space for all aircrafts from Belarus<sup>17</sup>, have led to an increased deterioration of the economic affairs of this state. The Minsk administration has responded by using its aircrafts to bring in migrants from the Middle East and Africa, who were promised to be granted asylum by the EU and then massed at

<sup>14</sup> Aristophanes’ Birds: A Dual Language Edition, Faenum Publishing, 2017, p. 51.

<sup>15</sup> Salomia, Oana-Mihaela, *Instrumente juridice de protecție a drepturilor fundamentale la nivelul Uniunii Europene, (Legal Instruments for the protection of fundamental rights in the EU)*, C.H. Beck, Bucharest, 2019, p. 184.

<sup>16</sup> Robin Emmott and Joanna Plucinska, *EU bans Belarus airlines as opposition urges G7 sanctions*, Reuters online at: <https://www.reuters.com/world/europe/eu-ban-belarus-overflights-midnight-diplomats-say-2021-06-04/>, consulted on 1.10.2021.

<sup>17</sup> Denis Cenușa, *Criza migrațiilor din Belarus, slăbiciunile UE și scenariile regimului lui Lukashenko (The Belarus migrant crisis, the weaknesses of the EU and the scenarios of the Lukashenko regime)*, 16 November 2021, online at: <https://www.hotnews.ro/stiri-opinii-25184160-criza-migrantiilor-din-belarus-slabiciunile-scenariile-regimului-lui-lukashenko.htm>, consulted on 1.10.2021.

the border with Poland, Latvia and Lithuania.

The situation of the thousands of migrants at the EU external border has become a contentious issue between the Member States affected by the provocative and irresponsible actions of the Minsk administration and the EU representatives. The latter have expressed their official position regarding the Polish request for financial aid to build a wall at the border with Belarus, through the President of the European Commission, Ursula von der Leyden, who said that the EU will not finance “barbed wires or walls”.<sup>18</sup>

**Carrot and stick approaches.** In our opinion, the EU response to the requests of the Member States affected by the migrant crisis, on one hand, and to the actions of the Minsk administration, on the other, represents a typical ideologically conditioned reaction and also a typical carrot and stick approach, where the economic sanctions act as the stick and the financial aid – as the carrot. At the same time, the EU legal framework has become a target for ideological attacks, being increasingly relegated to the limited role of supporting the political sides responsible for the internal divisions within the EU.

In this respect, one might quote the arguments put forth by the 12 signatory states of a joint letter to the high representatives of the European Commission, in support of building walls at the border with Belarus and of adopting supplementary measures which regard to the EU legal framework on immigration. It has thus been suggested the necessity to clarify and alter several provisions (e.g., Articles 13 and 28 of the EU Code on the rules governing the movement of persons across borders - Schengen Borders Code), which - the signatories of the joint letter claim - are flawed and do not cover the situation of a hybrid war, as is the ongoing conflict pursued by the Minsk government against the EU, using migrants as a means to blackmail and pressure.<sup>19</sup> Other requests concern a thorough review of the system for granting asylum, through the identification and removal of the pull factors.

Regardless of the arguments of the EU members most affected by the illegal immigration, no EU financing measures for the border walls have been officially announced by the end of 2021. We suggest that this is a flagrant case of infringement of the principle of solidarity, a fundamental principle enshrined in a number of EU founding treaties (for instance, in Article 3 TEU, in Articles 80, 222 TFEU etc.). Up to now, only the national Parliaments (in Poland and Lithuania) have allocated public funds for the building of border walls, although the external borders protection is a vital issue for the whole of the EU.

**In the United States of America,** there is a comparable situation, of ideologically-conditioned responses to the problem of illegal immigration and to the abuse of the refugee status. The US is facing an exponential increase in the number of migrants who either claim asylum status or are “undocumented”, i.e. they are entering the American territory without detection by any federal agency. As mentioned above, the problem of illegal immigration has worsened since 2014, the most affected states being those bordering Mexico, Texas in particular.

Taking into account the fact that immigration and border security fall within the exclusive competence of the federal government, the measures adopted by the Obama administration have been deemed insufficient to stop the flux of migrants and its associated issues: the surge in violent crime, the increase in drug trafficking controlled by the Mexican cartels, the proliferation of crimes against minors and vulnerable persons etc. The 2016 presidential elections were won by Donald Trump, who promised on the campaign trail, among other things, that he would build a wall at the Mexico border, paid for by the Mexican government itself, that he would enact a travel ban on Muslims and other citizens from security risk countries, until the federal authorities could properly vet them and that he would deport all the immigrants staying illegally on US soil. The media has carefully monitored the way his campaign promises were kept, those related to the construction of the border wall and the

<sup>18</sup> Daniel Boffey, *Ursula von der Leyen says EU will not fund 'barbed wire and walls'*, 22 October 2021, online at: <https://www.theguardian.com/world/2021/oct/22/ursula-von-der-leyen-says-eu-will-not-fund-barbed-wire-and-walls>, consulted on 1.10.2021.

<sup>19</sup> [https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter\\_Adaptation-of-EU-legal-framework-20211007.pdf](https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf), consulted on 1.10.2021.

deportation of illegal aliens falling into the category of broken promises.<sup>20</sup> One of the most vulnerable aspects of the Trump administration's response to these key issues was the legal form chosen to implement his policies. The American president enjoys broad powers, which are accompanied by specific legal instruments, such as proclamations and executive orders (EOs) through which the decision-making process is carried out. If these two legal instruments are very effective when the goal pursued is the rapid implementation of measures and policies, by circumventing the lengthy legislative process in the Congress and the negotiations between Republicans and Democrats, from a life-span perspective of such measures, these legal instruments are susceptible to be revoked as rapidly by the next administration, if of different political leaning.

For instance, in the first days after being sworn into office, Donald Trump signed an executive order which essentially changed the policy on the treatments of illegal aliens, providing the possibility to stop the federal aid to the states which did not comply with the rules on illegal immigration and tasking the Director of U.S. Immigration and Customs Enforcement to hire an additional number of immigration officers. The Executive Order 13768 of January 25, 2017 (*Enhancing Public Safety in the Interior of the United States*) explicitly assumes in Section 1 that federal agencies did not fulfil their obligation to enforce the immigration law: "Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility."<sup>21</sup>

This order has been revoked in the first weeks after the Biden administration took office. With the Executive Order 13993 of January 20, 2021 (*Revision of Civil Immigration Enforcement Policies and Priorities*), President Biden chartered an entirely different course on immigration (both legal and illegal): "Section 1. Policy. Immigrants have helped strengthen America's families, communities, businesses and workforce, and economy, infusing the United States with creativity, energy, and ingenuity. The task of enforcing the immigration laws is complex and requires setting priorities to best serve the national interest."<sup>22</sup>

The precariousness of the choice to use secondary legislation at the expense of the legislation adopted by the Congress, in order to rapidly implement the political vision of an administration, has been exposed beyond question in the issue regarding the Southern Border Wall. Its construction, a campaign promise made by Trump, has been set forth through an executive order, EO 13767 of January 25, 2017 (*Border Security and Immigration Enforcement Improvements*): "Section 2. Policy. It is the policy of the executive branch to: (a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism."<sup>23</sup> The "Wall" is defined in Section 3 (e) as "a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier".

This executive order has, too, been revoked, through yet another executive order at the beginning of the Biden administration, namely the Executive Order 14010 of February 2, 2021 (*Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*). The political statement on immigration and its consequences have provoked strong reactions from the Republican-run States on the Southern Border, affected by illegal immigration, such as Florida and Texas. The current American administration has been accused of endorsing an open-borders immigration policy, in violation of its constitutional

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<sup>20</sup> *US election 2020: Has Trump delivered on his promises?*, 15 October 2020, online at: <https://www.bbc.com/news/world-us-canada-37982000>. An online presentation of the status of 55 campaign promises made by Trump available at: <https://www.politifact.com/truth-o-meter/promises/trumpometer/>, consulted on 1.10.2021.

<sup>21</sup> <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states>, consulted on 1.10.2021.

<sup>22</sup> <https://www.federalregister.gov/documents/2021/01/25/2021-01768/revision-of-civil-immigration-enforcement-policies-and-priorities>, consulted on 1.10.2021.

<sup>23</sup> <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>, consulted on 1.10.2021.

prerogative and duty to safeguard border security. Section 1 of the Executive Order 14010 of February 2, 2021, declares that: “For generations, immigrants have come to the United States with little more than the clothes on their backs, hope in their hearts, and a desire to claim their own piece of the American Dream. These mothers, fathers, sons, and daughters have made our Nation better and stronger. The United States is also a country with borders and with laws that must be enforced. Securing our borders does not require us to ignore the humanity of those who seek to cross them. The opposite is true.”<sup>24</sup> With this and subsequent executive orders (for instance, the Executive Order 14011 of February 2, 2021, titled *Establishment of Interagency Task Force on the Reunification of Families*), a multitude of measures adopted by the Trump administration to fight illegal immigration have been revoked, the right to family reunification for the migrants has been reinstated, the compulsory anti-Covid-19 quarantine requirements have been lifted and a number of federal programs for the financial and economic assistance of the immigrants’ countries of origin have been put in place.

**Carrot and stick approaches.** The construction of the Southern Border Wall represents a wish of the local governments and communities, severely affected by the criminal activities of the Mexican drug cartels. As for Trump’s promise that Mexico was going to pay for the wall, not only it did not happen, but even the US Congress, dominated at that time by Trump’s Republican colleagues, did not approve the budget of 5 billion USD demanded by Trump for the construction of the wall, authorizing only 1.5 billion USD. The economic “stick” has been used without any notable effect by President Trump, who attempted to cut off the federal funding to the so-called *sanctuary cities*, which were Democratic-run, in their vast majority. In the absence of an official definition, a *sanctuary city* is considered to be a city which refuses to cooperate with the federal agents tasked to control illegal immigration<sup>25</sup>, in violation of the rules set forth in Section 1373 of the U.S. Code, regarding the duty to disclose and share information on the status of legal and illegal migrants between the federal and the local authorities. The use of the economic stick has triggered a storm of lawsuits against the Trump administration, many cities, counties and states accusing the Republican administration of allegedly violating the Separation of Powers principle (between the States and the federal government) and in many cases obtaining through litigation the disputed federal grants and even a nation-wide stay of some executive orders declared unconstitutional<sup>26</sup>.

The federal funds have been used as “carrots” by President Biden to please his political supporters. One of the Biden campaign promises concerns the normalization of illegal immigration, through a far-reaching amnesty, accompanied by significant financial compensations to the migrant families which suffered under the harsh policies of the Trump-era. The new course on immigration taken by the Biden administration has increased the pressure on the human and financial resources of the southern border states, faced with a huge number of migrants who force their way into the country either by themselves or with the aid of human-trafficking networks.

As a response to what the southern states (Texas and Florida) have seen as a dangerous lack of involvement on the part of the federal government and as a breach of the constitutional duty to protect the US borders, on May 3, 2021, the Republican Governor of Texas has declared State of Emergency at the border with Mexico, which was subsequently renewed on December 23. In September, Governor Abbott asked the Biden administration to issue a federal disaster declaration, in order to access special funds to finish building the wall and to increase the number of border patrol agents, but his request was turned down by the Federal Emergency Management Agency (FEMA).<sup>27</sup> Fast forward a couple of months and the Governor announced in December the allocation of funds

<sup>24</sup> <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>, consulted on 1.10.2021.

<sup>25</sup> “<Sanctuary> Jurisdictions: Federal, State, and Local Policies and Related Litigation”, by Sarah Herman Peck, Legislative Attorney, for the Congressional Research Service, updated May 3, 2019; online at: <https://sgp.fas.org/crs/homesecc/R44795.pdf>; see also: <https://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1400/cancel-all-funding-sanctuary-cities/>, consulted on 1.10.2021.

<sup>26</sup> For instance, see Decision 17-17478 from 2018 of the US Court of Appeals for the Ninth Circuit (City and County of San Francisco v. Trump, No. 17-17478 (9th Cir. 2018), online at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2018/08/01/17-17478.pdf>, consulted on 1.10.2021

<sup>27</sup> <https://gov.texas.gov/news/post/governor-abbott-announces-intention-to-appeal-fema-denial-of-federal-emergency-declaration-in-response-to-border-crisis>, consulted on 1.10.2021



from the state's budget to finish the wall<sup>28</sup>, as well as other measures to combat illegal immigration, promulgated by executive orders or submitted for approval by the national legislature of Texas as primary legal instruments.

In our opinion, the conflict between the federal administration and the administration of the states with different political views will be set to continue under the Biden presidency, because of the general lack of consensus amongst the American citizens on fundamental issues such as the immigration policy or the extent of federal powers relative to those of the states.

*"<Emergencies> have always been the pretext on which the safeguards of individual liberty have been eroded – and once they are suspended it is not difficult for anyone who has assumed emergency powers to see to it that the emergency will persist."  
(Friedrich A. Hayek)<sup>29</sup>*

### 3. To vaccinate or not to vaccinate: that is the question, but what is the answer?

Since its beginning in 2020, the Covid-19 crisis has raised countless economic, political and legal aspects, which the Western democracies thought settled a long time ago: the relation between a politically defined common good and individual rights, the exclusive or shared competences in matters regarding the public health in the US and EU, the democratic order and the state of emergency, the post-industrial economic model etc.

The most recent and contested avatar of these problems is represented by the mandatory vaccination, the legal consequences ensuing from the non-compliance with such mandate and the reaction of some sceptical part of the population to the whole vaccination process.

**A.** As was pointed out in some academic papers, **the European Union** has acted efficiently, in accordance with its shared competences, from the onset of the pandemic, providing financial aid to the states most affected by the Covid virus, such as Italy and Spain, and financing multiple vaccine development projects, with a Preferential Right to Purchase Option on vaccine doses for all Member States.<sup>30</sup> The vaccination campaign was implemented and coordinated by each Member State, and was accompanied by the collection and centralization of personal data of the vaccinated individuals. So far, according to the data provided by ECDC (The European Centre for Disease Prevention and Control), the EU average of anti-Covid-19 vaccinated citizens with a two doses vaccination scheme lies approximately at 68%, Portugal being the country with the highest vaccination rate (90% of the population).<sup>31</sup> In spite of the initial reticence to the new Messenger RNA (mRNA) type of vaccines such as Pfizer or Moderna ones, the high vaccination rate in the EU might be explained, on one hand, by the active promotion of these vaccines as a means to end the pandemic and to avoid the lockdowns like those seen in 2020 and, on the other hand, by the adoption of a string of carrot and stick measures, by which the population was "nudged" or downright forced to get the vaccine.

The EU legal framework regarding the protection of human rights and the fact that all EU Member States are signatories to the European Convention on Human Rights meant that vaccine mandates could not be imposed directly, but rather gradually and indirectly, after each "wave" of the pandemic caused by the mutations of the virus (which currently reached the Omicron variant). The first target groups for the mandatory vaccination were selected from those providing key public services – healthcare, law enforcement, defence and education, who were then subject to punitive measures for non-compliance, ranging from financial or disciplinary sanctions to having their employment contract suspended or terminated. France is such an example, where the Macron government has ordered all the healthcare personnel to be fully vaccinated by September 15, 2021.

<sup>28</sup> "Governor Abbott Debuts Texas Border Wall In Rio Grande City", online at <https://gov.texas.gov/news/post/governor-abbott-debuts-texas-border-wall-in-rio-grande-city>, consulted on 1.10.2021

<sup>29</sup> Hayek, Friedrich A., *Law, Legislation and Liberty*, Volume 3, Routledge Publishing, London, 1998, p. 124.

<sup>30</sup> For a detailed analysis, see also Salomia, Oana-Mihaela, Dumitraşcu, Augustina, "Eficacitatea măsurilor adoptate de Uniunea Europeană pentru sprijinirea statelor membre în perioada pandemiei de covid-19" (*The effectiveness of the measures taken by the EU to support Member States during the covid-19 pandemic*), in „Analele Universității din București”, C.H. Beck, 2020, p. 242-255.

<sup>31</sup> <https://vaccinetracker.ecdc.europa.eu/public/extensions/COVID-19/vaccine-tracker.html#uptake-tab>, consulted on 1.10.2021.

Also in France, a new bill which introduced the mandatory vaccination for all citizens starting with January 1, 2022, has been sent for parliamentary approval in August, the refusal to vaccinate being turned into a misdemeanour, punishable by a fine between 135 and 1500 euros. This legislative proposal was met with protests by the French and was rejected by an overwhelming parliamentary majority.<sup>32</sup> Though the vaccination of the health care workers is still compulsory across the entire French territory, both mainland and overseas, its implementation has been delayed in Martinique and Guadeloupe, because of the violent protests of the local population. As a result of the riots, the vax mandate has been postponed to the end of 2021 and the number of police forces has been increased.<sup>33</sup> Other countries, like Germany, for example, have opted for subtler approaches, “nudging” their citizens towards vaccination, by imposing on the unvaccinated restrictions on travel, participation to public life etc., or by requiring repeated anti-Covid-19 testing or proof of recovery. Depending on the country, meeting these obligations could become very expensive, if the test is not funded by the state, but paid for by the individuals – as is the case in Romania. In addition to the compulsory vaccination for health care workers – in Italy, Greece or France, the obligation to present the Green Pass to have access to public spaces (restaurants, public transport, shops, theatres etc.) still remains the most effective way for the EU governments to induce their citizens to get vaccinated.

The Green Pass has been design as an instrument to restore the freedom of movement within the EU<sup>34</sup>, to be used as of July 1st, 2021 until June 30th, 2022. A controversial aspect about the Green Pass regards the types of vaccines accepted, at first, the vaccines developed by countries such as Russia or China not making it on the list. Currently, the list has been updated and expanded and the European model of the Green Pass (EUDCC) has been taken up and implemented by other countries, like Taiwan, Singapore, New Zealand etc.

Ever since the introduction of the Green Pass, the policies of the EU Member States to induce the population to get inoculated have been labelled by the media as yet another typical **carrot and stick approach**. The carrot concerns the easing of travel restrictions within the EU, the resuming of many a commercial activity, the return to a partial and conditional normality, while the stick regards the financial penalties and legal restrictions imposed by the governments, with or without parliamentary approval, on the citizens who refuse the anti-Covid-19 vaccination - *the refuseniks*, as the journalists from The Financial Times sarcastically nicknamed them.<sup>35</sup>

**B. Unlike the EU countries, the United States of America** does not have such a rigidly regulated framework of individual rights, therefore it was possible to impose compulsory vaccination (with vaccines developed under the Trump administration) on broad categories of the population in a very direct manner, through instruments of delegated legislation, as well as through indirect measures, which differ from state to state, similar to those in Europe (restrictions on travel, on the operation of restaurants etc.). As shown in the previous section, the Biden administration has begun its mandate by revoking the majority of the executive orders issued by Trump on matters concerning immigration, environment protection or education. The measures to deal with Covid-19 cases and to encourage vaccination were adopted by executive orders, such as the Executive Order 13994 of January 21, 2021 (*Ensuring a Data-Driven Response to COVID-19 and Future High-Consequence Public Health Threats*) or the Executive Order 13991 of January 20, 2021 (*Protecting the Federal Workforce and Requiring Mask-Wearing*).<sup>36</sup> Since those measures did not decrease the number of infections, President Biden issued a vaccine mandate for all federal employees by Executive Order 14043 of September 9, 2021 (*Requiring Coronavirus Disease 2019 Vaccination for Federal Employees*), the

<sup>32</sup> [https://www.senat.fr/amendements/commissions/2020-2021/811/Amdt\\_COM-1.html](https://www.senat.fr/amendements/commissions/2020-2021/811/Amdt_COM-1.html), consulted on 1.10.2021

<sup>33</sup> “France delays vaccine mandate for health workers in riot-hit Caribbean islands”, Reuters, 26 November 2021, online at: <https://www.reuters.com/business/media-telecom/martinique-riots-gain-force-protesters-attack-police-journalists-2021-11-26/>; see also: <https://www.reuters.com/world/europe/france-sends-more-police-martinique-quell-covid-unrest-2021-11-30/>, consulted on 1.10.2021

<sup>34</sup> <https://www.covidpasscertificate.com/europe-digital-green-pass/>, consulted on 1.10.2021.

<sup>35</sup> Guy Chazan, Victor Mallet, *Europe adopts carrot-and-stick approach towards vaccine refuseniks*, 2 August 2020, online at: <https://www.ft.com/content/10c5954c-9dc4-4da6-acdc-37e446f49049>; see also “Carrot or stick? Which is best at pushing Europeans to get vaccinated”, Euronews, 14/07/2021, online at: <https://www.euronews.com/2021/07/14/carrot-or-stick-which-is-best-at-pushing-europeans-to-get-vaccinated#vuukle-comments-1594070>, consulted on 1.10.2021.

<sup>36</sup> <https://www.federalregister.gov/documents/2021/01/25/2021-01766/protecting-the-federal-workforce-and-requiring-mask-wearing>, consulted on 1.10.2021.

federal agencies with duties in health care – especially OSHA (*the Occupational Safety and Health Administration*) being task to elaborate mandatory standards for the enforcement of the mandate. On November the 5<sup>th</sup>, 2021, OSHA has issued an emergency regulation (*ETS - emergency temporary standard*), requiring all agencies and companies with more than 100 employees, either from the public or the private sector, to make sure that their employees are fully vaccinated by January 4, 2022, or tested each week against Covid-19, in order to be allowed to work amongst the vaccinated.<sup>37</sup> This controversial standard has been withdrawn as of January 26, 2022.

Under the now withdrawn ETS, the employees who refused to comply with the vaccine mandate or with the obligatory testing were to have their work contract terminated. For instance, the military personnel who refused vaccination was subject to being dishonourably discharged, losing all the benefits of the military status to which they would have been otherwise entitled to.<sup>38</sup> It has been estimated that the rate of vaccination amongst the US military personnel lies currently at 90%. The OSHA standard, who concerned approximately two thirds of the American workforce, was challenged in court by the workers' syndicates from the various economic sectors affected by it (healthcare, transportation, military), but also by some states with Republican governors. A wave of legal challenges ensued, many of them resulting in stay injunctions (for instance, *BST Holdings v. OSHA*, judged by the U.S. Court of Appeals of the 5<sup>th</sup> Circuit), followed by reinstatement (decided by the U.S. Court of Appeals of the 6<sup>th</sup> Circuit), and then by the decision of the US Supreme Court to hear oral arguments on January 7, 2022, in this case and in the case concerning the vax mandate issued by CMS (Centers for Medicare and Medicaid Services) for the health care workers.<sup>39</sup> The U.S. Supreme Court issued a stay on the mandate on January 13, 2022, in what is regarded as a decision split along partisan lines, as per *Biden v. Missouri*, 595 U.S. (2022). It is to be noted that the U.S. Supreme Court did not rule on whether compulsory nation-wide vaccination was constitutional or not, but merely granted a stay in its implementation, pending a decision in the competent lower court. Nevertheless, the OSHA ETS has been withdrawn, but the uncertainty about the powers of the federal administrative bodies to enforce such a mandate continues to stir and divide the public.

The legal stakes of the U.S. Supreme Court decision in these two cases bear upon the relationship between the powers of the federal government and the prerogatives of the states, but also on the ability of the executive branch to impose measures which profoundly affect individual rights through administrative regulations issued by federal agencies.

It is clear to see that the **carrot and stick policies** in the US are much harsher than those in the EU, the emphasis being put on sticks, rather than carrots, i.e. on stringent sanctions, like dismissal from work or huge financial fines for those refusing to wear sanitary masks. The incentivising measures, such as offering cash rewards (100 USD) to those taking the vaccine, have been disproportionately small when compared to the severity of the sanctions in case of refusal to get inoculated. The economic consequences are not born by the employees alone, but also by the private companies, which witnessed their economic activity substantially hit by strikes and personnel reduction. The actions taken without consulting the citizens or the states have increased the ideological fracture amongst the American public and the distrust from an important part of the population in the representation abilities of the current administration.

#### 4. Green Deal or No Deal?

The political controversies about climate change closely mirror and, in many cases, surpass in intensity and virulence, those on illegal immigration or compulsory vaccination. The ideological options on climate change have huge economic consequences, and the policies aimed at carbon footprint reduction have the potential to impact the whole world.

<sup>37</sup> <https://www.osha.gov/coronavirus/ets2>; for updates, see also: <https://www.federalregister.gov/documents/2022/01/26/2022-01532/covid-19-vaccination-and-testing-emergency-temporary-standard>, consulted on 1.10.2021.

<sup>38</sup> <https://www.usnews.com/news/national-news/articles/2021-11-02/how-the-military-is-handling-troops-who-refuse-coronavirus-vaccines>, consulted on 1.10.2021.

<sup>39</sup> <https://www.reuters.com/world/us/us-supreme-court-take-up-biden-vaccine-mandate-cases-2021-12-22/>, consulted on 1.10.2021.

In December 2019, **the European Commission** unveiled the European Green Deal, an ambitious program which aims to make the EU 100% carbon neutral by 2050, with an intermediary target of carbon footprint reduction of 55% by 2030. These assumed goals can be achieved only by a fundamental restructuring of the European economy and by an equitable transition towards a green economy, in agriculture, infrastructure, energy sector, food, textile and chemical industries etc. Furthermore, it has been put forth that massive immigration is a phenomenon partially caused by climate change and could be countered by the policies set out in the Green Deal pact.

It does not fall into the scope of this paper to analyse the content of the European Green Deal, but only the legal and ideological aspects of it, which seem to indicate, in our opinion, a democracy deficit, evident in the exclusion of the European citizens from the preliminary process of drafting this pact. As unwittingly suggested in its Section 4, the citizens are to be consulted *after* the adoption of the pact and only with respect to the means to implement the objectives that were already assumed: “Recent political events show that game-changing policies only work if citizens are fully involved in designing them. People are concerned about jobs, heating their homes and making ends meet, and EU institutions should engage with them if the Green Deal is to succeed and deliver lasting change. Citizens are and should remain a driving force of the transition.”<sup>40</sup>

With respect to the adoption process, it has been highlighted that the European Green Deal was passed through a Communication by the European Commission, “which does not mention any legal basis for the adoption and the drafting of these measures by the EU or by the EU Member States.”<sup>41</sup> The ambiguous legal nature of the communications made by the Commission makes it necessary to transpose the goals of the Green Deal Pact into primary or secondary legislation, such as treaties or regulations, to avoid potential challenges to its legality.

The European Green Deal and the subsequent legislation have spurred many controversies at national level in some Member States, the assumed goals being contested by the countries whose economies are to be severely impacted by the green transition, mostly in the energy sector. For instance, it has been estimated that Poland, where the energy sector relies mainly on coal, will lose more than 40,000 jobs because of the closure of the coal mines, while Bulgaria, Romania and the Czech Republic will lose 10,000 jobs each, if they meet the assumed (or rather imposed) Green Deal objectives.<sup>42</sup>

Regarding **the carrot and stick approaches**, they are already discernible in the way the EU budgetary resources are allocated. For now, the emphasis is put on the “orange” part, on carrots, many a promises being made to the individual Member States for substantial financial aid to ease the green transition, to create new jobs replacing the projected job losses, for cleaner air, more nutritious food, more energy-efficient infrastructure etc. The stick is starting to come into play in some proposals put forward to eliminate subsidies for certain types of fuel or to replace the Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law with a new Directive.<sup>43</sup> This Directive will cover aspects such as instituting new statutory offences against the environment and increasing the cross-border capacities to investigate and prosecute such offences.

Unlike the European countries, **the United States** enjoys a greater energy independence, ranking at the top of the oil and gas exporting countries, together with Russia and Saudi Arabia. This aspect makes the oil industry enormously influential in the US politics and economy. If at the EU level, most citizens do not contest the existence of climate change or the key role played by human factors in inducing it, in the US the opinions are much more diverse, being divided along ideological lines, as usual. As shown by several polls conducted by NGOs and researchers in the academia, the Democratic voters overwhelmingly believe that human activities make a significant contribution to

<sup>40</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN>, consulted on 1.10.2021.

<sup>41</sup> Salomia, Oana-Mihaela, *European legal instruments for green and digital transitions*, international conference “Challenges of the Knowledge Society”, 15<sup>th</sup> edition 2021, May 24, p. 489.

<sup>42</sup> Claeys, G., Tagliapietra, S., & Zachmann, G., *How to make the European Green Deal work*, 2 „Policy Contribution”, Issue no. 13, November 2019, p. 17, online at: [https://www.bruegel.org/wp-content/uploads/2019/11/PC-13\\_2019-151119.pdf](https://www.bruegel.org/wp-content/uploads/2019/11/PC-13_2019-151119.pdf).

<sup>43</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN>, consulted on 1.10.2021.

climate change, as compared to only 49% of the Republicans.<sup>44</sup> This difference of opinions is also reflected in the consistently divergent policies adopted by the Trump administration and, respectively, by the Obama or Biden administration, with regard to the international agreements on climate change, on developing alternative energy sources and reducing the use of fossil fuel etc.

Hard-set on fulfilling his campaign promises to ease the environmental standards adopted by the Obama administration and to pursue an economic policy geared towards economic growth and increased competitiveness for the US manufactured goods over Chinese-made products, Donald Trump has cancelled during his 4 years in office about 98 active programs related to the environment. At the beginning of his term, by Executive Order 13783 of March 28, 2017 (*Promoting Energy Independence and Economic Growth*)<sup>45</sup>, Donald Trump has revoked, among many other acts of the former Obama administration, The President's Climate Action Plan, aimed at reducing greenhouse gas emissions and developing alternative energy sources to fossil fuel.<sup>46</sup> Just as is the case with illegal immigration, Trump used delegated legislation as the main tool for achieving his policy goals, with the predictable result that all his executive orders on environmental issues were revoked by the Biden administration, at the beginning of its term. For instance, President Biden changed the priorities on environment by Executive Order 13990 of January 20, 2021 (*Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*), revoking more than 10 executive orders and memoranda issued by Trump, including the key permit for the controversial Keystone XL tar sands Pipeline.<sup>47</sup> On his first day in office, Joe Biden also signed the instrument to bring back the United States to the Paris Agreement on climate change, a pact from which the US withdrew under the former Republican administration.

In order to implement his policies on environment, President Biden adopted, very much like his predecessor, **carrot and stick measures**, offering financial rewards on a scale unmatched since President Roosevelt launched the New Deal program in 1933. By means of a 2,135-page social spending Bill, attractively titled “The Build Back Better” Act, which was passed by the House, but is still debated by the Senate, the American administration plans to allocate billions of dollars for environmental projects, for the manufacture of electric cars and solar panels and for the development of green technologies. The federal funds represent, as in the case of European states, an abundance of “carrots” for the companies manufacturing these technologies, but also a “stick” for those in the traditional energy sector, which see themselves excluded from such benefits.

## 5. Conclusions

The topical, pre-defined analysis in the sections above on issues concerning illegal immigration, wall building and mandatory vaccination clearly illustrates, in our opinion, the limitations of the carrot and stick approaches to solve critical social problems or plan the future, its green colour notwithstanding.

Offering financial incentives from the state budget leads to addiction to public money, limiting in the long run the healthy competition between private companies. Moreover, the award of federal or EU funds to private businesses, even when aimed at encouraging research, innovation or the implementation of public policies, has often been criticised for the enormous potential to encourage corruption and to favour certain political and economic interest groups. As a recent example, the ambitious Build Back Better project of the Biden administration has been blamed for granting fiscal credits for the purchase of electric vehicles, but only for the vehicles produced by companies with a unionised workforce, which rules out from the start producers such as Tesla, Toyota and Honda.

<sup>44</sup> <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/>, consulted on 1.10.2021.

<sup>45</sup> <https://www.federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth>, consulted on 1.10.2021.

<sup>46</sup> For a detailed list of the executive orders related to environmental and climate issues, adopted by Donald Trump and subsequently rescinded by President Biden, see the analysis made by the experts in environmental and energy law at Harvard Law School, online at: [https://eelp.law.harvard.edu/wp-content/uploads/Trump-EOs-Rescinded-Table\\_March-3-2021\\_EELP.pdf](https://eelp.law.harvard.edu/wp-content/uploads/Trump-EOs-Rescinded-Table_March-3-2021_EELP.pdf), consulted on 1.10.2021.

<sup>47</sup> <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>, consulted on 1.10.2021.

Another controversial aspect of this Bill reflects the support of niche ideologies, by the disproportionate allocation of public funds as measured against their social impact – the case of earmarking 3 billion dollars to increase “the community tree canopy” or “tree equity” (the planting of trees in urban areas), i.e. to advance the equitable distribution of trees in neighbourhoods discriminated against because of historic, racial and similar reasons.

The preference for **carrot and stick measures** in the economic and social areas is linked to another identifiable trend in the Western democracies today, namely the growing role of the government in all aspects of social life - a tenet accepted as natural in the EU states, but hotly contested in the US, at least by conservative voters. The Covid-19 crisis has offered the governments around the world the opportunity to tighten social control, under the principled garb of safeguarding the public health, by means of implementing restrictions which affect individual rights and liberties. These tendencies could be subsumed under a more worrisome trend, concerning the ways in which the executive branch abuses its powers to issue delegated legislation, with the ensuing result of legislative instability and loss in the axiological purpose of the regulations. This situation can be discerned not only in the US, but also at EU level, where the European Commission made repeated use of “soft” legal instruments, which do not constitute primary or secondary sources of law and are not subject to public debate.

The corrective measures to remedy the dysfunctional relationship between law, economy and the current ideologies, either right or left wing, are already in the making, and are aimed at restoring the balance between the powers of the federal government or the EU institutions and those of the U.S. or EU individual Member States. In the light of recent events, we consider that the rebalancing of the prerogatives of sovereignty will also necessarily require the involvement of the courts – for instance, the U.S. Supreme Court agenda for 2022 is topped by cases which raise these constitutional issues. In the same vein, it also remains to be seen if the infringement procedure launched in December 2021 by the European Commission against Poland because of challenges to the precedence of the EU law over the national law will reach the European Court of Justice. Perhaps suppler European institutions with diminished powers from the ones currently enjoyed might strengthen the European cohesion and prevent a repetition of the Brexit scenario.

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