

Sustainable production as a driver for rewriting European Treaties

Francesco de Leonardis

SUMMARY: 1. The Italian constitutional reform of 2022: a model to be followed also in Europe? – 2. The change of perspective in European policy documents. – 3. The Circular Economy in European law. – 4. The need to amend European Treaties.

1. *The Italian constitutional reform of 2022: a model to be followed in Europe as well?*

In 2022 in Italy, for the first time in the history of the Republic, the initial part of the Constitution (that came into force in 1948) on fundamental principles was amended¹.

Constitutional Law n° 1/2022 has recently integrated article 9, which now states: «1. The Republic shall promote the development of culture and of scientific and technical research. 2. It shall safeguard the natural beauties and the historical and artistic heritage of the Nation. 3. *It shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals.*» (new parts in italics).

The part of the Italian Constitution on “Economic Relations” (i.e., Title III of Part I on the “Rights and Duties of Citizens”) was also amended, specifically article 41, the text of which now states that «1. Private economic enterprise shall have the right to operate freely. 2. It cannot be carried out in conflict with social utility or in such a manner as may harm *health, the environment*, safety, liberty and human dignity. 3. The law shall determine appropriate programmes and

¹ Among the works of Italian doctrine written in English about environmental protection in the Italian Constitution before the reform of 2002, see F. Fracchia, *Environmental Law. Principles, Definitions and Protection Models*, Napoli, 2015, 105-112.

checks to ensure that public and private economic enterprise activity be directed at and co-ordinated for social *and environmental* purposes» (new parts in italics).

There have been numerous comments on this reform by the doctrine, with judgments sometimes favourable, sometimes critical and, in other cases, differentiated in relation to the two amended constitutional provisions².

Most of the contributions focused on the amendment of article 9³. There was, however, no shortage of reflections on article 41 in which it was pointed out that this very article could become the basis legitimizing a real re-design of the economy and markets in a sustainable sense by the public authorities and with the involvement of businesses⁴.

Starting from this last very innovative constitutional provision (similar provisions are contained only in the French Constitution⁵), this contribution aims to show how a transformation process similar to the one that took place in Italy is already underway in European law as well⁶.

² See, e.g., G. Cocco, voce *Ordinamento costituzionale*, in Codice dell'Ambiente, *Profili generali e speciali*, a cura di S. Nespor, L. Ramacci, Milano, 2022, 152 ss.; M. Cecchetti, *Virtù e limiti degli articoli 9 e 41 della Costituzione*, in *Corti Supreme e Salute*, 2022, 1 (published as an introduction also in Atti del Convegno Aidambiente, 28 January 2022, *La riforma costituzionale in materia di tutela dell'ambiente*, Napoli, 2022, 9); A. Morrone, *L'«ambiente» nella Costituzione. Premesse di un nuovo «contratto sociale»*, in Atti del Convegno Aidambiente, cit., 91; R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, in *Federalismi.it*, 6 aprile 2022 (published also in Atti del Convegno Aidambiente, cit., 69); E. Chiti, In motu. *L'Unione europea e la trasformazione della costruzione giuridica della sostenibilità*, in Atti del convegno Aidambiente, cit., 183; A. Police, *Il diritto costituzionale dell'ambiente in Europa. Discorrendo con Edoardo Chiti e Massimo Monteduro*, in Atti del Convegno Aidambiente, cit., 211; M. Monteduro, *Riflessioni sulla «primazia ecologica» nel moto del diritto europeo (anche alla luce della riforma costituzionale italiana in materia ambientale)*, in Atti del convegno Aidambiente, cit., 221; M. Delsignore, A. Marra, M. Ramajoli, *La riforma costituzionale e il nuovo volto del legislatore nella tutela dell'ambiente*, in *Riv. giur. amb.*, 2022, 1; A.O. Cozzi, *La modifica degli artt. 9 e 41 Cost. in tema di ambiente: spunti dal dibattito francese sulla Carta dell'ambiente del 2004 tra diritti e principi*, in *DPCE online*, 2021, 4, 3391 ss. Finally see F. de Leonardis, *La riforma «bilancio» dell'art. 9 Cost. e la riforma «programma» dell'art. 41 Cost. nella legge costituzionale m. 1/2022: suggestioni a prima lettura*, in *ApertaContrada*, 28 February 2022 (published also in Atti del Convegno Aidambiente, cit., 49).

³ See for example F. Fracchia, *L'ambiente nell'art. 9 della Costituzione: un approccio in «negativo»*, in Atti del Convegno Aidambiente, cit., 123; G. Severini, P. Carpentieri, *Sull'inutile anzi dannosa modifica dell'art. 9 della Costituzione*, in www.giustiziansieme.it, 22 September 2021.

⁴ L. Cassetti, *La riforma dell'art. 41 della Costituzione: modello economico e tutela dell'ambiente*, in *Federalismi*, 2022, 4 (special issue «Scritti in onore di Paola Bilancia») and also published in Atti del Convegno Aidambiente, cit., 141; B.G. Mattarella, *Le nuove previsioni dell'art. 41 della Costituzione in materia di ambiente*, in Atti del Convegno Aidambiente, cit., 165; M. Ramajoli, *Attività economiche, poteri pubblici e tutela dell'ambiente nel nuovo art. 41 della Costituzione*, in Atti del Convegno Aidambiente, cit., 169.

⁵ The Charter for the Environment of France's Constitution states in art. 6 that «public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress». The Charter for the Environment is a constitutional law of France approved in 2005, forming part of the constitutional block (*bloc de constitutionnalité*) of French law having the same force as the Constitution.

⁶ See the UNEP reports, *New frontiers in Environmental Constitutionalism*, 2017; *Environmental Rule of Law*, 2019 and *Rule of Environmental Law and its Failures*, 2019. In Europe, see *The Costs of not Implementing Environmental Law*, Bruxelles, 2019.

For the time being, the evidence of this evolution from a completely “indifferent” European Union with respect to production, and to the market and its dynamics⁷, to a European legal system that is moving decisively in the direction of shaping the economy and the production of goods and services in an environmental sense, can be seen very clearly in the policy acts⁸ and in secondary law. This change in trajectory could soon affect the highest levels of European law, i.e., the law of the Treaties⁹.

As is well known, while there are numerous regulations in the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Nice, that deal with the environment, which will be briefly reviewed in the last section of this contribution; none of them refer to the environment as an interest that “dictates” the transformation of the economy¹⁰.

2. *The change of perspective in European policy documents*

The European political-programmatic documents – from which emerges the need for transformation of production models already referred to in article 8 of the Rio Declaration and in chapter 8 of the 1987 report “Our Common Future”¹¹ – which should be analysed in this perspective, are numerous and for reasons of brevity we will limit ourselves to recalling the most relevant ones.

⁷ The liberal tradition (*libertarian cluster*), which ideologically found its point of reference in the American Constitution, was against the inclusion of environmental protection except as administrative regulation of polluting activities: see, for example, R. Lazarus, *The Making of Environmental Law*, The University of Chicago Press, Chicago-London, 2008. In general on the European Economic Constitution see S. Cassese, *La Costituzione economica europea*, in *Riv. it. dir. pubbl. com.*, 2001, 6, 907 and R. Miccù, *Le trasformazioni della costituzione economica europea: verso un nuovo paradigma?*, in *Federalismi.it.*, 2019.

⁸ It particularly emphasises the importance of policy choices: A. Jordan and V. Gravey, *Environmental Policy in the EU. Actors, Institutions and Processes*, London, 2021.

⁹ See E. Chiti, *Introduction to the Symposium: Managing the Ecological Transition of the European Union (Introduzione al Simposio “Gestire la transizione ecologica dell’Unione europea”)*, in *Riv. quad. dir. amb.*, 2021, 1, 9-13.

¹⁰ See generally H. Genot, D. Tarlock, D.L. Laswell, *The Current Global Outlook: how is Industry doing in meeting the Rio Declaration Goals*, in *John Marshall Law School*, 1999, 292; A. Ambroziak (ed.), *The New industrial Policy of the European Union*, Springer, 2017; J. Cameron, *Globalization and the Ecological State*, in *Review of European Comparative & International Law*, 1999, 8, 243ss.; K. Backstrand, A. Kronsell, *Rethinking the Green State: Environmental Governance Towards Climate and Sustainability Transitions*, London, 2015; D. Rodrik, *Green industrial policy*, in *Oxford Review of Economic Policy*, 2014, 3.

¹¹ W. Lang (ed.), *Sustainable Development and International Law*, London, 1995; P. Sands, *International law in the Field of Sustainable Development*, in *British Yearbook of International Law*, 1994, 65, 303 ss.; A.B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, in *Georgetown International Environmental Law Review*, 2003, 21 ss.; M.C. Cordonier Segger, A. Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects*, Oxford, 2004; N. Schrijver, *International Law and Sustainable Development: Principles and Practice*, Leiden, 2004; Id., *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, in *Recueil des cours*, 2007, 329, 217 ss; A. Djoghlaflaf, *The Concept of Sustainable Development*, in *Environmental Policy and Law*, 2006, 211 ss.

These include a dozen documents such as the communication on *Integrated Product Policy* from 2003; the 6th, 7th and 8th *Environmental Action Plans* from 2002, 2013 and 2022 respectively; the 2018 European *Bioeconomy Strategy* (the first version was published in 2012); the 2019 European *Green Deal*; some 2020 documents such as the *EU Biodiversity Strategy*¹², the *Farm to Fork Strategy*, the *Circular Economy Action Plan*¹³, the *Critical Raw Materials Action Plan*¹⁴, the *2020 Industrial Strategy*¹⁵ and the *EU Soil Strategy for 2030*¹⁶.

The *Integrated Product Policy Building on Environmental Life-Cycle Thinking* of 2003¹⁷ has the merit of being the first policy document at European level to clearly point out that the production of goods and services can play a very important role in favour of sustainable development. Consequently, a “product dimension” in environmental policy is necessary¹⁸.

Already at the beginning of the 2000s, Europe was therefore demonstrating that sustainable production was not just one of the elements of the implementation measures of any thematic strategy for environmental protection, but one of its essential pivots.

These concepts are taken up explicitly in some of the eight environmental action programmes (also called “action plans”) that have followed since 1973 until today: references to sustainable production, already present in passing since

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Eu Biodiversity Strategy for 2030 Bringing nature back into our lives*, Brussels, 20 May 2020 COM(2020) 380 final.

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *A new Circular Economy Action Plan For a cleaner and more competitive Europe*, Brussels, 11 March 2020, COM(2020) 98 final.

¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability*, Brussels, 3 September 2020, COM(2020) 474 final.

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New Industrial Strategy for Europe*, COM (2020) 102 final, 2.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Soil Strategy for 2030. Reaping the benefits of healthy soils for people, food, nature and climate*, COM (2021) 699 final. See, especially, par. 4.3 and 6.2.

¹⁷ Communication from the Commission to the Council and the European Parliament, *Integrated Product Policy Building on Environmental Life-Cycle Thinking*, Brussels, 18 June 2003, COM(2003) 302 final.

¹⁸ The focus shifts decisively from point source pollution protection to product design: it is worth quoting literally: «up to now, product-related environmental policies have tended to focus on large point sources of pollution, such as industrial emissions or waste management issues. Often these have been successful. Now, however, it is becoming clear that they need to be complemented by a policy that looks at the whole of a product’s lifecycle, including the use phase» (par. 2). See R. Malcolm, *Integrated Product Policy?, a New Regulatory Paradigm for a Consumer Society*, in *European Energy and Environmental Law Review*, 2005, 14, 5, 134-144.

the Fifth Action Plan¹⁹, begin to be frequent from the *Sixth Environmental Action Programme of 2002*²⁰.

It states that one of the objectives of European environmental policies is precisely to create «more sustainable production and consumption patterns» and to this end, not only should penalty systems for non-compliant companies be envisaged, but «schemes should be introduced to reward good performance»²¹.

There is a growing realization that the “regulatory approach”, whereby results are fundamentally expected from public authority intervention, is no longer sufficient and that there is a need to vary the strategy so as «to influence decisions made by business, consumers, citizens and policy planners»²² i.e. that in order to achieve environmental results, it is essential to involve the economic system²³.

Particularly relevant from the point of view of changing the perspective and shaping the economy and production as an “irreplaceable ally” of environmental protection is the *Seventh Environmental Action Programme covering the period 2013-2020*²⁴.

The title of this action plan “Living well, within the limits of our planet” literally refers to the presence of something external, physical, real, and objective with which we have to contend and which imposes the need to reform global economies²⁵.

The systemic reorientation of production in a green direction²⁶ (or the provision of a genuine product policy) is explicitly mentioned among the instruments that can be used to «ensure that economic and social progress is achieved within

¹⁹ This resolution of 1 February 1993 (Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a *Community programme of policy and action in relation to the environment and sustainable development*) stated that the Member States agree “that the achievement of sustainable development calls for significant changes in current patterns of development, production, consumption and behaviour”.

²⁰ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the *Sixth Environment Action Programme* of the European Community *Environment 2010: Our future, Our choice*, COM(2001) 0031 final.

²¹ *Sixth Environment Action Programme*, cit., Executive Summary, Context for the new programme. In addition to these actions to be implemented in order to steer the market in a certain direction, there are also actions to inform consumers so that they can choose the most environmentally friendly products; to eliminate public subsidies in favour of environmentally harmful practices; to encourage companies to innovate, perhaps by seizing the opportunities offered by the use, development and dissemination of clean technologies.

²² *Sixth Environment Action Programme*, cit., par. 2.

²³ R. Malcolm, *Life Cycle Thinking as a Legal Tool: a Codex Rerum*, in *Law, Environment and Development Journal*, 2019, 215, 2, 13.

²⁴ Decision no. 1386/2013/EU of the European Parliament and the Council of 20 November 2013, on a General Union Environment Action Programme to 2020 *Living well, within the limits of our planet*.

²⁵ The *Seventh General Programme for Action* makes it clear that exceeding these limits leads to irreversible changes with potentially disastrous consequences for human beings. It also points out that respecting the Planet’s ecological limits has become “imperative”, since transgressing them implies the risk of exceeding the point of no return.

²⁶ F. Preston, *A global redesign? shaping the circular economy*, in *Energy, Environment and Resource Governance*, London, 2012

the carrying capacity of the Earth»²⁷. Hence the need to change production and consumption patterns since, again according to this action plan, without these changes any efforts to protect the environment would be doomed to failure²⁸.

The reorientation of production and consumption systems²⁹ therefore requires the collaboration of public authorities and the market. Both are essential and ineliminable in order to preserve the Planet, man and other species and ecosystems³⁰. What is needed is a «balanced mix of incentives for consumers and businesses (including SMEs), market-based instruments and regulations to reduce the environmental impacts of their operations and products»³¹.

In the *Eighth Environmental Action Plan 2022* (abbreviated to “8th EAP”)³², even more numerous are the references to sustainable production: one of the priority objectives of the plan is precisely «minimising environmental pressures from production and consumption across all sectors of the economy»³³.

The Eighth Environment Action Programme clearly states the need to reorient the economy in an inclusive manner³⁴. It indicates which type of economy it is

²⁷ *Seventh Environment Action Programme*, priority objective 9, par. 106 (viii). The encouragement and favouring of the “transition to a green economy” is based on the consideration that “current wasteful production and consumption systems in the world economy rising global demand for goods and services and the depletion of resources are increasing the cost of essential raw materials, minerals and energy” par. 8.

²⁸ The last fifty years of environmental policies, which have seen *states* playing a leading role in countering the various threats to the planet, show that, if we want results in this sense, *non-state actors* must be more directly involved, *first and foremost* companies, but also and above all consumers, who, moreover, tend to take on an increasingly larger role in so-called climate justice: L. Umbers, J. Moss, *Climate Justice Beyond the State*, London, 2021.

²⁹ Although the three objectives set out in article 2 of the *Seventh Environment Action Programme* are all interconnected, the objective set out in point (b) is immediately related to this objective, which is to «turn the Union into a resource-efficient, green and competitive low-carbon economy».

³⁰ Among the key instruments to this end, according to this action plan, are “measures [...] to further improve the environmental performance of goods and services on the Union market over their whole life cycle” (and “measures to increase the supply of environmentally sustainable products and stimulate a significant shift in consumer demand for such products” (*Seventh Environment Action Programme*, priority objective 2, par. 35)

³¹ Par. 35 of the *Seventh Environment Action Programme*.

³² Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030.

³³ 8th EAP, recital no. 17. The concept is also taken up in other points of the *Eighth Environment Action Programme*: «through continuous research and innovation, transformation of production and consumption patterns, and adaptation to new challenges and co-creation, the well-being economy strengthens resilience and protects the well-being of present and future generations» (par. 16); «promoting environmental aspects of sustainability and significantly reducing key environmental and climate pressures related to the Union’s production and consumption, in particular in the areas of energy, industry, buildings and infrastructure, mobility, tourism, international trade and the food system» (art. 1, par. 2, lett. f). Among the conditions required of the Member States for the realisation of the objectives is that of «closing gaps in, and optimising, relevant indicator sets, such as those relating to systemic change, planetary boundaries and the Union’s production and consumption footprints, as well as those that address the interface between environmental and socioeconomic factors, such as inequalities arising from environmental change, whilst ensuring that indicator sets are comparable at all levels of policy-making» (art. 3, lett. z).

³⁴ «The 8th EAP enables a systemic change to a Union economy that ensures well-being within planetary boundaries where growth is regenerative and should also ensure that the green transition is achieved in a just and inclusive way, whilst contributing to reducing inequalities»: recital no. 13.

aiming towards³⁵ using such adjectives as *green, fair, inclusive, circular, neutral, sustainable, efficient*. It also speaks of “regenerative growth”³⁶ that “enables systemic change”³⁷ and that “provides a safe operating space within planetary boundaries”³⁸.

The *Bioeconomy Strategy*³⁹ is another policy-programmatic document from which emerges the need for a public re-orientation of the economy or its systemic re-design within the limits of the planet in order to achieve environmental goals.

In fact, rather than a single document, reference should be made to a series of documents: two communications, one in 2012 and one in 2018, and also a review of the strategy in 2017 have been dedicated to the topic of the bioeconomy so far.

The first Bioeconomy strategy for Europe of 2012 stated that «the bioeconomy provides a useful basis for such an approach, as it encompasses the production of renewable biological resources and the conversion of these resources and waste streams into value added products, such as food, feed, bio-based products and bioenergy»⁴⁰.

The second version of the European Bioeconomy Strategy, the 2018 version, also opens with a reference to the concept of limits: «we live in a world of limited resources» and it is precisely this limitation of available resources «coupled with a growing population» that leads to the search for “new ways of producing and consuming that respect the ecological boundaries of our planet”⁴¹.

Another relevant policy document is the 2019 *European Green Deal*⁴², which could be seen as a true “forge” of the transformative scope of the European Economic Constitution⁴³.

³⁵ «The 8th EAP should accelerate the green transition, in a just and inclusive way, to a climate-neutral, sustainable, nontoxic, resource-efficient, renewable energy-based, resilient and competitive circular economy that gives back to the planet more than it takes»: recital no. 16.

³⁶ 8th EAP, recital no. 19.

³⁷ Id., recital no. 16.

³⁸ *Ibid.*

³⁹ As we shall see, in the various documents, there is no real definition of the bioeconomy but a reference to a set of sectors that are involved in it. According to the 2012 *Bioeconomy Strategy*, «the bioeconomy includes the sectors of agriculture, forestry, fisheries, food and pulp and paper production, as well as parts of chemical, biotechnological and energy industries» (3, footnote 3).

⁴⁰ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *Innovating for Sustainable Growth: A Bioeconomy for Europe*, 13 February 2012, COM (2012) 60 final, par. 1.1.

⁴¹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *A sustainable Bioeconomy for Europe: Strengthening the connection between economy, society and the environment*, Brussels, 11 October 2018, COM (2018) 673 final, para 1.

⁴² 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*, Brussels, 11 December 2019, COM (2019) 640 (briefly “Green Deal”).

⁴³ E. Chiti, *In motu. L'Unione europea e la trasformazione della costruzione giuridica della sostenibilità*, cit., 204 refers to it as the “transformative force”, the “potentially destabilising force” of the European Economic Constitution, a generator of “potential conflicts”, a factor of “significant torsions” on the concepts of property, sovereignty and public power. See also E. Chiti, *Introduction to the Symposium: Managing the Ecological*

The *Green Deal* opens with a reference to climate change («The atmosphere is warming and the climate is changing with each passing year»)⁴⁴ and immediately links this to the need for a profound transformation of the economy, which implies the often-referenced public power of direction and coordination: «the EU has the collective ability to transform its economy and society to put it on a more sustainable path»⁴⁵.

And it is precisely the transformation of the economy in such a way that it can guarantee the survival of the planet and humanity that is the deepest sense of the continually evoked «ecological transition»: it is «an opportunity to put Europe firmly on a new path of sustainable and inclusive growth»⁴⁶.

The EU no longer looks at the economy (and the market) from a position of neutrality or indifference with respect to the ends it autonomously sets for itself. Instead, it actively aims to use the economy as an ally (or as a new instrument) in attempting to win a game that after fifty years, with other types of instruments, we are still losing.

The Union expressly proposes to adjust the current situation of the Planet precisely by “greening” the economy (this is the content of the «initial roadmap of the key policies and measures needed to achieve the European Green Deal»)⁴⁷.

The *EU Biodiversity Strategy for 2030*⁴⁸, which is an update of the 2011 *Biodiversity Strategy*⁴⁹, opens with enlightening words regarding the need to reorient the economy: «the European Green Deal – the EU’s growth strategy – will be the compass for our recovery, ensuring that the economy serves people and society and gives back to nature more than it takes away»⁵⁰.

Transition of the European Union (Introduzione al Simposio “Gestire la transizione ecologica dell’Unione europea”), cit. «beneath the surface of the apparently technical goal of climate neutrality (the European Green Deal) lurks a re-orientation of the fundamental mission of the European integration project».

⁴⁴ *Green Deal*, par. 1. Previously, also in the Resolution of 28 November 2019 on the climate and environment emergency (2019/2930/RSP) the Parliament had declared «a climate and environment emergency» calling on «the Commission, the Member States and all global actors, and declares its own commitment, to urgently take the concrete action needed in order to fight and contain this threat before it is too late», lett. c par. 1).

⁴⁵ *Green Deal*, par. 1.

⁴⁶ *Ibid.*

⁴⁷ An entire paragraph of the *Green Deal* is significantly entitled “Mobilising industry for a clean and circular economy”: the challenge of the survival of the planet and mankind cannot be met without a «full mobilisation of industry» and this mobilisation must take place quickly since «it takes 25 years – a generation – to transform an industrial sector and all the value chains», par. 2.1.3.

⁴⁸ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *EU Biodiversity Strategy for 2030 Bringing nature back into our lives*. See M. Biscosi, *Two Parallel Discourses and a New Path for Policy-Making: The Biodiversity Strategy for 2030*, in *Riv. quad. dir. amb.*, 2021, 1, 44 ss.

⁴⁹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *Our life insurance, our natural capital: an EU biodiversity strategy to 2020*, Brussels, 3 May 2011, COM(2011) 244 final.

⁵⁰ *EU Biodiversity Strategy for 2030*, par. 1. The same introductory paragraph states that «the world should commit to the net-gain principle to give nature back more than it takes. As part of this, the world should

The political will is also evident here: it states the need for «legally binding EU nature restoration targets in 2021 to restore degraded ecosystems, in particular those with the most potential to capture and store carbon and to prevent and reduce the impact of natural disasters»⁵¹.

In the same vein, the 2020 *Farm to Fork* Strategy should also be recalled, which significantly opens with a reference to the limits of the Planet⁵² and the need to reshape the economy in a different sense⁵³. In that document, the remodelling of the agri-food system is envisaged in such a way as to make the food supply chain more sustainable. The idea is to achieve a fair and environmentally friendly food system, with a series of objectives, including quantitative ones⁵⁴, so as to optimise the factors of production.

The basic idea is that the agricultural enterprise can – and indeed, to some extent, must – contribute to environmental protection. To this end, all stages of the production chain must be reviewed, including choices on the resources to be used, the marketing of products, as well as the management of the following stage with regard to waste and surpluses⁵⁵.

But perhaps the most important document of the pandemic year is *A new Circular Economy Action Plan For a cleaner and more competitive Europe*⁵⁶, which

commit to no human-induced extinction of species, at minimum where avoidable».

⁵¹ EU Biodiversity Strategy for 2030, par. 2.2.1.

⁵² Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, Brussels 20 May 2020 COM(2020) 381 final: «the COVID-19 pandemic has underlined the importance of a robust and resilient food system that functions in all circumstances, and is capable of ensuring access to a sufficient supply of affordable food for citizens. It has also made us acutely aware of the interrelations between our health, ecosystems, supply chains, consumption patterns and planetary boundaries»; par. 1. About this communication see H. Schebesta, M. Alessandrini, F. Cazzini, C. Macchi, M. Plana-Casado & S. Rolandi, *Tour de table: farm to fork law update*, in *European Food and Feed Law Review* (EFFL), 2022, 17(3), 208-218 and H. Schebesta, N. Bernaz & C. Macchi, *The European Union Farm to Fork Strategy: Sustainability and Responsible Business in the Food Supply Chain*, in *European Food and Feed Law Review* (EFFL), 2020, 15(5), 420-427.

⁵³ «A transition to sustainability of the food system will change the economic fabric of many EU regions and their patterns of interactions»: *A Farm to Fork Strategy*, 2020, par. 2.

⁵⁴ Concrete targets to be achieved by 2030 concern pesticides (reducing the use of the most dangerous pesticides by 50%), nutrients (reducing nutrient losses by at least 50% while ensuring that soil fertility does not deteriorate, and reducing fertiliser use by at least 20%), antimicrobial resistance (reducing the use of antimicrobials such as antibiotics for farm and aquaculture animals by 50%) organic farming (allocate at least 25% of the agricultural area to organic farming).

⁵⁵ The basic idea is that it is necessary to review all phases of the production chain, including choices on the resources to be used. The marketing of products should also be subject to review, as well as the management of the subsequent phase in relation to waste and surpluses. See M.C. Rizzuto, *L'incidenza dell'interesse ambientale nella produzione e nella commercializzazione dei prodotti agro-alimentari*, in *Ambienteditto*, 2022, 3, 13.

⁵⁶ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *A new Circular Economy Action Plan For a cleaner and more competitive Europe*, Brussels, 11 March 2020 COM (2020) 98 final.

opens with a reference to the limits of natural resources⁵⁷ and the need for environmental impacts to remain within sustainable limits for our Planet⁵⁸.

Hence the need to reorient the economy in a “regenerative” sense⁵⁹. It is no longer a question of merely encouraging circular production with voluntary instruments or consumer information, according to an approach cherished by some stakeholders, but of making this type of *green* production mandatory or binding⁶⁰.

The Commission’s commitment is to propose «a sustainable product policy legislative initiative. The core of this legislative initiative will be to widen the Ecodesign Directive beyond energy-related products so as to make the Ecodesign framework applicable to the broadest possible range of products and make it deliver on circularity»⁶¹.

The new Plan of Action on the Circular Economy marks the path of a true “industrial revolution”, which sees the transition from a linear paradigm to a model based on the reduction of new materials used, the durability of products (the so-called “extension of the useful life of products”), their reuse and recycling, the increase of production efficiency and the minimisation of waste production⁶².

Also related to the topic of the circular economy is the new 2020 Critical Raw Materials Action Plan⁶³. Critical raw materials are defined as those non-food

⁵⁷ «There is only one planet Earth, yet by 2050, the world will be consuming as if there were three. Global consumption of materials such as biomass, fossil fuels, metals and minerals is expected to double in the next forty years, while annual waste generation is projected to increase by 70% by 2050», *A new Circular Economy Action Plan*, 2020, par. 1.

⁵⁸ It explicitly mentions the «growing need to advance discussions on defining a ‘Safe Operating Space’ whereby the use of various natural resources does not exceed certain local, regional or global thresholds and environmental impacts remain within planetary boundaries», *A new Circular Economy Action Plan*, 2020, par. 7.

⁵⁹ «The EU needs to accelerate the transition towards a regenerative growth model that gives back to the planet more than it takes, advance towards keeping its resource consumption within planetary boundaries, and therefore strive to reduce its consumption footprint and double its circular material use rate in the coming decade» *A new Circular Economy Action Plan*, 2020, par. 1.

⁶⁰ It is worth quoting in full from the Plan: «instruments such as the EU Ecolabel or the EU green public procurement (GPP) criteria are broader in scope but have reduced impact due to the limitations of voluntary approaches. In fact, there is no comprehensive set of requirements to ensure that all products placed on the EU market become increasingly sustainable and stand the test of circularity», par. 2.1. The shift from voluntary to mandatory compliance with technical requirements for circularity in the production and life cycle of products is also emphasised further on: «the possibility to introduce requirements linked to environmental and social aspects along the value chain, from production through use to end of life, will also be carefully assessed, including in the context of WTO rules».

⁶¹ *A new Circular Economy Action Plan*, 2020, par. 2.1. This is the proposal for a regulation on eco-design of March 2022, which starts from the consideration that there are products on the market that generate unnecessary negative impacts on the environment and that there is a need, instead, to stimulate the supply and demand for sustainable goods, to achieve sustainable production and to ensure a level playing field for products sold on the internal market.

⁶² According to some estimates, the circular economy could lead – together with the development of the regenerative bio-economy – to greenhouse gas emission savings of 45%, to be achieved through the use of eco-design.

⁶³ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions *Critical Raw Materials Resilience: Charting a Path towards*

and non-energy raw materials whose political, commercial and environmental supply problems make a change in economic strategy and a decisive technological upgrade a priority.

Another fundamental document for redesigning the economic system is the *Industrial Strategy for Europe*, which is contained so far in two key documents: the 2017 Strategy⁶⁴ and the 2020 Strategy⁶⁵. The latter states, on the one hand, that we need to influence industrial processes so that they reduce their carbon footprint⁶⁶ or that we need to modernise and decarbonise⁶⁷ with new industrial processes and cleaner technologies. It also states, on the other hand, that we need to «revolutionise the way we design, make, use and get rid of things by incentivising our industry»⁶⁸.

3. *The Circular Economy in European Law*

The desire for a reorientation of the economy in a green direction in Europe emerges not only from the policy and planning acts analysed so far, but also from a number of interventions in the legislation.

These include, in chronological order, the Ecodesign Directives from 2005, the 2018 Circular Economy package of four Directives, the 2019 Single-Use Plastic Products Directive, and the 2021 Recovery and Resilience Facility Regulation⁶⁹ establishing the post-Covid Recovery and Resilience Facility⁷⁰.

In the light of these interventions, the greening of the economy does not therefore now appear to be merely a political aspiration, but constitutes a real ongoing process that has also been enshrined in European law, and is now also crystallised in secondary legislation, albeit of a sectoral nature.

The first frontier that has been addressed by the European legislator in these acts of European law is that of the energy performance of products as it is the one

greater Security and Sustainability, Brussels, 3 September 2020, COM(2020) 474 final.

⁶⁴ European Parliament resolution of 5 July 2017 on building an ambitious EU industrial strategy as a strategic priority for growth, employment and innovation in Europe (2018/C 334/13).

⁶⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions *A New Industrial Strategy for Europe* COM (2020) 102 final.

⁶⁶ *A New Industrial Strategy for Europe*, 2020, par. 2.2.

⁶⁷ *Ibid.*, par. 3.3.

⁶⁸ *Ibid.*, par. 3.4.

⁶⁹ In Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (abbreviated “RRF Regulation”) the term “transition” is mentioned some 30 times.

⁷⁰ On RRF Regulation in general, see Atti del Convegno AIPDA “*Next generation EU. Proposte per il Piano nazionale di ripresa e resilienza*”, 28 april 2021 (www.apida.it).

most immediately and directly connected with energy saving and, therefore, with the goal of reducing the amount of greenhouse gases in the atmosphere.

Consider the Ecodesign Directive already in force since 2005⁷¹ and amended in 2009⁷², in which we find one of the first definitions of ecodesign as «the integration of environmental aspects into product design with the aim of improving the environmental performance of the product throughout its whole life cycle»⁷³.

Although the scope of this directive was limited to a specific set of products, and in particular only to «energy-related products»⁷⁴ as textually defined⁷⁵ it can be said that it opened the way for a general reflection on the production of products that must possess certain technical characteristics that characterise them as sustainable⁷⁶.

Basically, in these directives and in the acts that are now in preparation in the sector⁷⁷ one of the main contents of the powers of direction and coordination of the green economy is clearly indicated, namely the indication of technical specifications of certain products.

Still among the legislative interventions in the direction of reorienting the economy in an environmental sense, it is worth mentioning the four directives that make up the *Circular Economy* package⁷⁸. The first is Directive 851/2018/EU (the so-called “waste directive”)⁷⁹; the second is Directive 852/2018/EU

⁷¹ The first ecodesign directive is Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products.

⁷² Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products. This directive was further amended by Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products.

⁷³ Art. 2, point 23 of Directive 125/2009.

⁷⁴ Art. 1 par. 1 Dir. 2009/125.

⁷⁵ Art. 2, par. 1 Dir. 2009/125.

⁷⁶ It is rightly noted that the European Economic and Social Committee (EESC) stated in an opinion that «the ecodesign of goods and services needs to go beyond just energy considerations. Although these are important, there is a need to have a focus on the full lifecycle of products, including their durability, ease of maintenance and repair, potential for sharing and digitisation, reuse, upgradeability, recyclability and actual uptake after use in the form of secondary materials in products entering the market». (Opinion of the European Economic and Social Committee on the Communication from the Commission Ecodesign Working Plan 2016-2019 [COM(2016) 773 final], para. 1.2): C. Schweng, *Responsabilità estesa del produttore. Riguarda solo i produttori?*, in *I quad. economia circolare*, 2021, 1, 12.

⁷⁷ This refers to the Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC. The proposal extends ecodesign from energy-related products to all products. It will apply to practically all products on the European market except food, seeds and medicines, i.e. to approximately 65% of products. The requirements will be such not only to save energy but also to make products more durable, repairable, recyclable. In any case, it will be necessary to make consumers more aware of the environmental impacts of the products they use (the so-called *digital product passport*).

⁷⁸ Published in the *OJEU* on 14 June 2018.

⁷⁹ The Waste Directive (851/2018) amends the Waste Framework Directive 2008/98/EC.

(the so-called “packaging directive”)⁸⁰; the third is Directive 850/2018/EU (the so-called “landfill directive”)⁸¹; the fourth is Directive 849/2018/EU (the so-called “vehicles, batteries and WEEE directive”)⁸².

The fact that the “Circular Economy” package (and the action plans connected with the circular economy⁸³) largely concerns the subject of waste (except for the one on landfills, which, however, is connected with it) could lead to the misunderstanding of thinking that this set of rules only concerns the specific waste sector⁸⁴. An analysis of the contents of these legal acts leads to a different conclusion: the real novelty lies precisely in that redesign also mentioned at the level of global law. This re-design implies what is defined as a “systemic approach”, in which waste management is a segment of a broader system⁸⁵.

Such redesigning of products and services with a systemic approach – in accordance with the limits of the Planet and the needs brought by as the world’s population grows – enters fully into secondary legislation.

The concept of ecodesign or (re)design is, in fact, one of the fundamental themes of both the Waste Directive (2008/98/EC)⁸⁶, which considers ecodesign as one of the examples of waste prevention⁸⁷, the Packaging Directive⁸⁸, the End-

⁸⁰ The Packaging Directive (852/2018) amends Dir. 94/62/EC.

⁸¹ The Landfill Directive amends Directive 1999/31/EC.

⁸² It amends the directive on end-of-life vehicles 2000/53/EC, the directive on batteries and accumulators and waste batteries and accumulators, the directive on waste electrical and electronic equipment (WEEE).

⁸³ This refers to the *Circular Economy Action Plan. For a cleaner and more competitive Europe* adopted on 11 March 2020.

⁸⁴ For R. Ferrara, *Brown economy, green economy, blue economy: l’economia circolare e il diritto dell’ambiente*, in *Diritto e processo amministrativo*, 2018, 3, 48, waste constitutes the “logical starting point” of any discourse related to the circular economy.

⁸⁵ See M. Geissdoerfer, P. Savaget, N.M.P. Bocken, E.J. Hultink, *The circular economy – A new sustainability paradigm*, in *J. Clean. Prod.*, 2017, vol. 143, 757 ss.; J. Korhonen, A. Honkasalo, J. Seppälä, *Circular Economy: The Concept and its Limitations, Ecological Economics*, Amsterdam, 2018, 148; F. Bonciu, *The European Economy: From a Linear to a Circular Economy, Romanian J. Eur. Aff.*, 78°, 2014. See finally F. de Leonardis, voce *Economia circolare (dir. Pubbl.)*, in *Dig. disc. pubbl.*, 2021, 161 ss.

⁸⁶ Cf. recital 27 for which «the introduction of extended producer responsibility in this Directive is one of the means to support the design and production of goods which take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling without compromising the free circulation of goods on the internal market»; art. 8, par. 2 for which «Member States may take appropriate measures to encourage the design of products and components of products in order to reduce their environmental impact and the generation of waste in the course of the production and subsequent use of products, and in order to ensure that the recovery and disposal of products that have become waste take place in accordance with Articles 4 and 13»; art. 9, par. 1, for which «Member States shall take measures to prevent waste generation. Those measures shall, at least: (a) promote and support sustainable production and consumption models; (b) encourage the design, manufacturing and use of products that are resource-efficient, durable (including in terms of life span and absence of planned obsolescence), repairable, re-usable and upgradable; [...]».

⁸⁷ Annex IV no. 4 considers this to be «the promotion of eco-design (the systematic integration of environmental aspects into product design with the aim to improve the environmental performance of the product throughout its whole life cycle)».

⁸⁸ See Art. 9(5) for which «by 31 December 2020, the Commission shall examine the feasibility of reinforcing the essential requirements with a view to, inter alia, improving design for reuse and promoting high

of-Life Vehicles Directive⁸⁹ and, above all, the Waste Electrical and Electronic Equipment (WEEE) Directive⁹⁰.

The need to preserve or otherwise draw on virgin resources in moderation constitutes the “unspoken” premise of the concept of circular economy, which defines an economic system that could be described as mimetic to the natural one (in which we take in a balanced manner and in accordance with the rhythms of regeneration, in which nothing is wasted and nothing is destroyed but in which everything is reused) and which is quite different from the economic model generally prevalent globally.

4. *The need to amend European Treaties*

In the light of the European political acts and laws referred to above, it becomes clear that the Treaties no longer fully reflect the material constitution of Europe, which is now clearly oriented in the direction of changing production (and consumption) patterns.

It has been accurately pointed out that, «in the Treaties and the Nice Charter, the words ‘ecosystem’ or ‘ecosystems’, the adjective ‘ecological’, not even the words ‘biodiversity’ or ‘species’, not to mention other ecological concepts such as, for example, ‘resilience’ [...] and the noun ‘nature’ are never mentioned as an object of legal protection»⁹¹.

It is also true that the references to environmental protection found in them⁹², which are quantitatively eight times fewer than those relating to com-

quality recycling, as well as strengthening their enforcement. To that end, the Commission shall submit a report to the European Parliament and to the Council, accompanied, if appropriate, by a legislative proposal».

⁸⁹ Cf. recital 2 Dir. 2000/53 («design of vehicles for recycling and recovery»); recital 11 («it is important that preventive measures be applied from the conception phase of the vehicle onwards [...]»); recital 13 («the requirements for dismantling, reuse and recycling of end-of-life vehicles and their components should be integrated in the design and production of new vehicles») and, above all, art. 4, par. 1 lett. a) and b) in relation to the production of new vehicles that facilitate recycling.

⁹⁰ Cf. recitals 4 and 9 dir. 2012/19 recalling the ecodesign directives; recital 11 recalling the life cycle of products; recital 12 recalling producer responsibility as a tool to encourage the sustainable design of EEE and, above all, art. 4 expressly dedicated to the ecodesign of products.

⁹¹ M. Monteduro, *Riflessioni sulla “primazia ecologica” nel moto del diritto europeo (anche alla luce della riforma costituzionale italiana in materia ambientale)*, cit., 245.

⁹² On the protection of the environment in European law, also the Italian literature is by now boundless: we merely recall among the encyclopaedic entries G. Cataldi, voce *Ambiente (tutela dell’): Il diritto delle comunità europee*, *Enc. giur.*, 2001; G. Cordini, voce *Ambiente (tutela dell’) nel diritto delle comunità europee*, in *Dig. disc. pubbl.*, I, Torino, 1987, 193; B. Nascimbene, voce *Ambiente (tutela dell’) (diritto comunitario)*, in *Nov. dig. it.*, App., Torino, 1980, 274. Among the general works see S. Grassi, *Principi costituzionali e comunitari per la tutela dell’ambiente*, in Aa.Vv., *Scritti in onore di A. Predieri*, Milano, 1996, II, 907; N. Font, *La politica ambientale*, in S. Fabbrini e F. Morata (a cura di), *L’unione europea. Le politiche pubbliche*, Bari, 2002, 166-192; S. Casese (a cura di), *Diritto ambientale comunitario*, Milano, 1995; B. Beutler et. al., *L’Unione europea. Istituzioni*,

petition⁹³, are always accompanied by a reference to development, as in a sort of *excusatio non petita*⁹⁴.

Therefore, the need for revision of the current EU Treaties can be found among the substantial considerations, the right that is already being experienced, the law in action, contained in the policy documents and in the acts of secondary legislation referred to so far.

The consideration of environmental needs (in a sort of ecological primacy) as it emerges from the European policy documents and the laws that have been referred to –, and the need to functionalise the economy to them –, does not lead to a denial of the need for development, but to contextualise it within the structural limits of our planet.

Inevitably, all this seems to impose, sooner or later, a real rewriting of the treaties currently in force⁹⁵, both of the TEU and of the TFEU. To date, in those

ordinamento e politiche, Bologna, 2001, 615-619; G. Cocco ed altri, *Ambiente*, in M.P. Chiti, G. Greco (a cura di), *Trattato di dir. amm.vo europeo*, Milano, 1997, 102.

⁹³ As M. Monteduro reports, «the only word that appears and stands out is, in fact, ‘environment’: but – and this is not a mere statistical curiosity – considering the entire texts of the TEU, the TFEU and the Nice Charter, and excluding the cases in which it is used in a generic way (such as when the Treaties mention the ‘working environment’, an ‘environment favourable’ or ‘conducive’ to initiative and to the development of undertakings’ and to ‘cooperation between undertakings’, an ‘environment of security’ with respect to defence, etc.), the word ‘environment’ appears about 20 times; the word ‘environment’ appears about 20 times; the words ‘competition’, ‘competitive’, ‘market’ and ‘markets’, on the other hand, recur a total of more than 150 times; which gives, in addition to mere numerical data, a different order of weight, intensity, relevance» (*Riflessioni sulla “primazia ecologica” nel moto del diritto europeo (anche alla luce della riforma costituzionale italiana in materia ambientale)*, cit., 246

⁹⁴ It is as if the European legislator, every time it refers to the need for environmental protection policies, felt obliged to specify that such protection must not be to the detriment of development or the market. It preaches the balancing and equiordination of interests in theory but in practice affirms the supremacy of economic interests over environmental ones. As has been accurately considered, “environment”, in the lexicon of the Treaties and the EU Charter, is always associated with the concept of “sustainable development” (right from the Preamble of the TEU and then consistently in the two Treaties, as well as in the Preamble and Article 37 of the Nice Charter). The environment is therefore a polymorphous concept that, however, is expressly “based” – and thus finds its own valuable legal foundation in this – «on balanced economic growth and price stability, on a highly competitive social market economy» (article 3 TEU). 3 TEU). The same principle of environmental integration (art. 11 TFEU) is placed «in particular with a view to promoting sustainable development»; in this context, it is not surprising that sustainability also acquires an economic/financial dimension, such as «sustainable balance of payments» (art. 119 TFEU) and «sustainability of the government financial position» (art. 140 TFEU). Ultimately, the concept of sustainable development assumed by the EU Treaties is inspired by the idea of a «harmonious development» (preamble of the Charter), of a «balanced progress» (art. 26 TFEU), of a «balanced and steady development of the internal market» (art. 309 TFEU) and more specifically of «economic and social development [...] balanced» (art. 191 TFEU); M. Monteduro, *Riflessioni sulla “primazia ecologica” nel moto del diritto europeo (anche alla luce della riforma costituzionale italiana in materia ambientale)*, cit., 246.

⁹⁵ In this sense M. Monteduro, *Riflessioni sulla “primazia ecologica” nel moto del diritto europeo (anche alla luce della riforma costituzionale italiana in materia ambientale)*, cit., 254 for whom «personally I would tend to believe that the horizon of “ecological primacy” requires, in order to assert itself in a structural, profound, organic and pervasive manner, a “constitutional” change expressed in the text of the Treaties (or of the EU Charter of Fundamental Rights): the latter, in fact, no longer appears to be in step with a dramatically changed planetary ecological framework; a traditional conception of sustainable development remains engraved in the current constitutional framework of the EU legal system, which is rather refractory to the idea of the primacy

two Treaties, there is no provision such as article 41, paragraph 3 of Italian Constitution in which the constraint of conforming the economy and production to environmental purposes is established.

Indeed, the references to shaping the economy in the direction of sustainable production in the EU Treaty are for the time being to be considered only implicit: the reference to the “principle of sustainable development” in the preamble⁹⁶; the high level of protection and improvement of the quality of the environment in article 3⁹⁷; and the need to promote sustainable development also in developing countries in article 21⁹⁸.

Similarly, an analysis of both the nine norms that expressly deal with the environment in the TFEU, the six contained in the general part of the Treaty⁹⁹, and the three norms found in the specific part dedicated to the environment¹⁰⁰,

of interests outside the market, as it is still oriented, in a privileged if not exclusive manner, towards the proper functioning of the market». For a more doubtful formulation E. Chiti (*In motu. L'Unione europea e la trasformazione della costruzione giuridica della sostenibilità*, cit., 203) for whom the “ecological primacy” introduced by the *Green Deal* initiates a process that «seems destined to take place with unchanged treaties, that is, without the current European constitutional framework being modified or reformed», albeit «without excluding the possibility of a revision of the constitutional framework».

⁹⁶ «Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields».

⁹⁷ «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance».

⁹⁸ «The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty» (para. 2).

⁹⁹ Article 4, according to which the Union shares competence with the Member States in environmental matters (point e); article 11, according to which environmental protection is to be integrated into all European policies; article 36, according to which derogations to the free movement of goods may be made «justified on grounds of [...] the protection of health and life of humans, animals or plants»; Article 114, according to which «the Commission, in its proposals [...] concerning [...] environmental and consumer protection, shall take as a base a high level of protection, taking account, in particular, of any new development based on scientific facts.) environment and consumer protection, will take as a basis a high level of protection, taking account in particular of any new development based on scientific facts» The Commission, in its proposals [...] concerning [...] environmental protection and consumer protection, will take as a basis a high level of protection, taking account in particular of any new development based on scientific facts»; article 177 states that «[...] A Cohesion Fund set up [...] shall provide a financial contribution to projects in the fields of environment [...]».

¹⁰⁰ Then there are the three provisions of Title XIX on the environment (arts. 191-193), which contain the objectives of environmental policy (art. 191, par. 1), the principles that must guide Community action in environmental matters (art. 191, par. 2) (on the need for data for environmental protection see R.P. Kelly, *Will more, better, cheaper and faster monitoring improve environmental management?*, in *Environmental Law*, 2014, 44, 1111-1148), the data that the Community must take into account when preparing its policy on the environment (art. 191, par. 3), the modalities of cooperation between the Community and the States or international organisations (art. 191, par. 4), the decision-making procedure (art. 192) and the principle of increased protection whereby measures taken on the basis of Article 192 do not prevent individual member states from maintaining and taking measures for even greater protection (art. 193).

does not reveal a particular focus on “what to produce” or on redesigning the economic system in a business-friendly manner. It does, however, necessitate a stronger public intervention like the one mentioned previously.

Not even the Charter of Fundamental Rights of the European Union, proclaimed in Nice in October 2000¹⁰¹, which expressly deals with the environment in article 37 (for which «a *high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and guaranteed in accordance with the principle of sustainable development*») and the draft of the European Constitution which fully transposed these principles¹⁰², incorporate the innovations outlined above.

In conclusion, only the future will tell whether the constitutional level of European law will formally acknowledge the need to reform production in a sustainable direction. It is undeniable, however, that the Union’s law in action has been moving decisively in that direction for almost twenty years now.

¹⁰¹ Already in the preamble reference is made to “balanced and sustainable development”; article 37 expressly states that «A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

¹⁰² The most relevant references to the environment were found in arts. III-4; III-129; III-130 and III-131.

