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French Yearbook *of* Public Law

Issue 1, 2023

Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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Contents

General 9

Foreword 11

The Future of the French Model of Public Law in Europe
Sabino Cassese 13

Conceptual and Linguistic «Surprises» in Comparative Administrative Law
Jean-Bernard Auby 19

Dossier: Climate Change and Public Law 23

Climate Change and Public Law Dossier: Introduction
Jean-Bernard Auby / Laurent Fonbaustier 25

Part I: A Global Approach

The Paris Agreement: A Renewed Form of States' Commitment?
Sandrine Maljean-Dubois 35

European Union law at the time of climate crisis: change through continuity
Emilie Chevalier 51

"Transnational" Climate Change Law A case for reimagining legal reasoning?
Yseult Marique 69

Part II: Climate Change in Constitutions

Analysis of constitutional provisions concerning climate change
Laurent Fonbaustier / Juliette Charreire 89

Part III: Climate Change Litigation

Increasing Climate Litigation: A Global Inventory
Ivano Alogna 101

Climate change litigation: efficiency
Christian Huglo / 125

Climate Change Litigation and Legitimacy of Judges towards a 'wicked problem': Empowerment, Discretion and Prudence
Marta Torre-Schaub 135

Could national judges do more? State deficiencies in climate litigations and actions of judges
Laurent Fonbaustier / Renaud Braillet 165

Part IV: Cities, States and Climate Change: Between Competition, Conflict and Cooperation
Global climate governance turning translocal
Delphine Misonne 181

America's Climate Change Policy: Federalism in Action
Daniel Esty 193

Local policies on climate change in a centralized State: The Example of France
Camille Mialot 217

Part V: Climate Change and Democracy
Subjective Rights in Relation to Climate Change
Alfredo Fioritto 233

Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach
Emmanuel Slautsky 253

The Citizens' Climate Convention : A new approach to participatory democracy, and how effective it was in terms of changing public policy?
Delphine Hedary 271

Conclusion
Jean-Bernard Auby / Laurent Fonbaustier 281

Comparative Section 293
France
Philippe Cossalter / Jean-Bernard Auby 295

Germany
Philippe Cossalter / Maria Kordeva 311

Italy
Francesca di Lascio / Elena d'Orlando 337

Spain
Patricia Calvo López / Teresa Pareja Sánchez 357

UK
Yseult Marique / Lee Marsons 379

Miscellaneous 405
Book review: Susan Rose-Ackerman, Democracy and Executive Power. Policymaking Accountability in the US, the UK, Germany and France
Giacinto della Cananea 407

A Comparative Research on the Common Core of Administrative Laws in Europe
Giacinto della Cananea 413

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European Union law in times of climate crisis: change through continuity

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Abstract:

This paper examines the impact of climate change challenges on European administrative law. Despite the disruptive effects of climate change, the structure of Union law remains largely unchanged, suggesting the EU's commitment to addressing this challenge within its existing legal framework. While the EU relies on established mechanisms for its climate change policies, it also demonstrates adaptability and flexibility in pursuing its objectives, resulting in a dynamic regulatory environment. The paper discusses the use of existing legislative tools and the enrichment of regulatory mechanisms, especially in terms of governance and control. However, it raises questions about the suitability and adequacy of these mechanisms in the context of climate transition.

Keywords:

Climate change, European administrative law, European Union law, Regulation of climate transition

From the very beginning of the development of an international policy to combat climate change, through the adoption of the UN Framework Convention on Climate Change[1] and later the Kyoto Protocol,[2] the European Union played a leading role in the international arena. The Union's commitment was only reinforced following the failures of the Copenhagen Summit, given the former's continuing efforts to push for the conclusion and subsequent ratification of the Paris Agreement. The Union's unique legal nature was swiftly regarded as a strength in this context. Indeed, the effectiveness of EU law and its enforcement mechanisms are promising features to successfully set international standards.[3] Ratifying these conventions compels the EU to ensure the effectiveness of these international obligations, which introduces another layer of – perhaps more effective - accountability for Member States.

Combatting climate change has therefore altered the European Union's legal system, both on normative and institutional level. The European Union has long been a pioneer in this area. Its Emissions Trading Scheme for instance allocates emissions quotas to companies.[4] More recently, the launch of the Green Deal has strengthened the ground on which the Union develops action in this field. Whereas the Green Deal is not exclusively limited to environmental issues, combatting climate change nevertheless occupies a significant place therein. Aiming to make the Union "the first climate-neutral continent", reaching zero net GHG emissions in 2050 and decoupling economic growth from resource use, the EU's objectives are undisputedly ambitious. They are implemented in the context of the so-called 'Fit for 55 package', aiming to reduce emissions.[5] The European Union's commitment has been translated to an increasingly precise, thorough, and sophisticated body of legislation, illustrating the angles from which action can be taken to tackle this challenge.

However, the ultimate successes – provided they do exist – have not yet been fully materialised.[6] From a substantial point of view, the challenge of combating climate change implies profound systemic changes which the present political, economic and even philosophical system might ultimately not be able to tackle. The need for radical change in

1 United Nations Framework Convention on Climate Change, 9 May 1992, ratified by the EU by Council Decision 94/69/EC of 15 Dec. 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change, OJ L 33, 7.2.1994, pp. 11–12.

2 Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, 11 Dec. 1997, ratified by the EU by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, OJ L 130, 15.5.2002, pp. 1–3.

3 Oberthür, S. & Pallemaerts, M. (eds.), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy*, 2010, Brussel, Asp/ Vubpress /Upa.

4 Dir. Nº 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, pp. 32–46.

5 The Fit for 55 package is a set of proposals to revise and update EU legislation and to put in place new initiatives with the aim of ensuring that EU policies are into line with the climate goals, noticeably in the field of energy, transport, agriculture…

6 Since its introduction in 2005, the EU's emissions have decreased by 41%, see: https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/.

managing this issue undeniably calls for a re-evaluation of potential approaches.

Generally speaking, climate change challenges have had a disruptive effect on legal systems, notably by altering modes of governance and enriching interactions between legal systems.[7] Yet, it does not seem as if the structure of Union law in general, or of European administrative law in particular, has been deeply altered or called into question. It seems that the Union envisaged to tackle the perhaps greatest challenges of the century on the basis of its legal system in its present shape. This paper aims to analyse the regulatory paths developed by the EU, showing that from a formal and procedural perspectives, innovation remains limited. The EU primarily relies on existing mechanisms. One may wonder whether such an approach is fully adequate to tackle the challenge of climate transition. However, one also has to admit that the Union shows a great potential to adapt itself, to be flexible enough to be resilient to achieve its objectives, while creating an interesting regulatory dynamic. The EU's climate change policy required the adoption and amendment of numerous pieces of legislation, using both classical and original tools, yet none which would be specific to the regulation of climate transition (I). The EU's regulatory mechanisms and governance have been enriched. Particular attention has been paid to control mechanisms, which have not changed significantly, and thus raise questions of adequacy (II).

I. Different paths of regulation

While the Paris Agreements[8] undoubtedly mark a turning point in the intensity of the Union's legislative output in the fight against climate change, post 2015 the Union made intensive use of its competencies in the field and increased its legislative activities (2.1). Beyond the obvious quantitative increase in legislation (2.2), it is worth pointing out the broad diversity of the approaches adopted. The challenge of fighting climate change has an impact on regulatory approaches. While these developments, such as the use of soft law or standards, are not necessarily specific to this field, they are characteristic features thereof, over and above the increasing density of legislation (2.3). At the same time questions might be raised to further amend existing legislation (2.4).

A. Extending the European regulatory framework: a matter of competences

Firstly, from a substantial perspective, the European Union's action to fight against climate change is long-standing and now covers a broad spectrum. Combating climate change is one of the EU's environmental policy objectives.[9] However, managing the climate emergency called for a multi-scale approach, relying on several different legal bases as provided for in the Treaty: environment, protection of human health,[10] transport,[11]

7 Fisher, E., Scotford, E., Barritt, E., "The Legally Disruptive Nature of Climate Change", *The Modern Law Review* 2017, vol. 80, issue 2, pp. 173-201.

8 Paris Agreement of 12 Dec. 2015, ratified by the EU by Council Decision (EU) 2016/590 of 11 April 2016 on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ L 103, 19.4.2016, pp. 1–2.

9 Art. 191 §1 TFEU.

10 Art. 168 TFEU.

11 Art. 90 TFEU.

energy,[12] international trade,[13] agriculture,[14] etc. The diversity of legal bases available makes allows for the adoption of a systemic approach, which is essential for managing the climate crisis. Whereas the environmental impact of the climate crisis seems evident, all areas of public policies are called upon to develop an effective response. Given that the cause of climate change is primarily anthropogenic, no field of human action should prima facie be excluded.

Given the specific features of the Union's legal system, several preconditions must be fulfilled before the Union may take action in the first place. Governed by the principle of conferral, the EU can only intervene to the extent and with the intensity provided for by the Treaties. This is a major constraint on potential Union action, and raises issues of consistency. Yet two features facilitate the development of a coherent approach. Firstly, as per Article 11 TFEU environmental protection should generally be taken into account in any European policy. Secondly, it should be pointed out that the European Union's action on climate change is now part of the overall framework of the Green Deal.[15] The latter represents a roadmap that will enable the EU to realise its ambitions in the field of environmental protection. It is based on the assumption that all measures and policies adopted by the EU must play a part in achieving climate neutrality.

Moreover, to fully understand the scope of EU action in the field one needs to pay attention to the very basics of European constitutional law - the conditions under which the EU may exercise its competences and the intensity thereof. European law knows three different kinds of competences – exclusive, shared and supporting/coordinating competences. Shared competences, to which environmental protection largely belongs,[16] is governed by the principles of subsidiarity and proportionality.[17] This means that EU action is to be limited to those cases in which the EU is better suited to act than the Member States which often translates into the Union limiting itself to govern the most essential aspects of the policy. Thus, by its very nature, the Union's action, even if significant, is often incomplete. To comprehend the full scope of the policy national implementation and/or the exercise of national competence, which complement the exercise of the EU competence, will have to be considered.[18] The fact remains, however, that the European Union has proven to be increasingly interventionist in this area.

B. Normative and regulatory techniques

Apart from the question of competences, various techniques are used in the regulation of the climate crisis and transition by the Union.

First of all, a normative, rather classical approach aims at defining rules of behavior, obligations and rights targeting primarily the Member States and economic operators.

12 Art. 194 TFEU.
13 Art. 206 TFEU.
14 Art. 38 TFEU.
15 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions "The European Green Deal", com/2019/640 final.
16 Art. 4(2)(e) TFEU.
17 Art. 5 TEU.
18 The question will not be dealt with in this contribution, which limits itself to focus on the European Union's action.

Obviously, indirectly these rules may also have an impact on individuals, NGOs and sub-state authorities, all of which will be targeted at the stage of implementation of European law. It is interesting to note that recently texts which are emblematic of the Union's general approach have been adopted. For example, the European Union has adopted "its Climate Law", expressly referred to as such - even though formally this 'law' takes the form of a regulation.[19] The terminology used is clearly inspired by national law concepts. The *climate law* sets out the Union's commitments and objectives, and defines the areas in which they are to be implemented. Moreover, within the 2030 European Union climate and energy policy framework[20] a dedicated instrument concerning greenhouse gas emissions and removals from land use, land-use change and forestry (LULUCF) was adopted.[21] The latter proved necessary given that these activities are potentially high emitters of greenhouse gases,[22] and are hence decisive carbon sinks to achieve climate neutrality. The legislation is furthermore interesting because the question of soil use is a subject that is hardly addressed in European Union law, unlike the other components of the ecosystem.[23]

The just described normative approach is further supported by other techniques. First of all, a salient feature is the setting of targets in various pieces of legislation. The overall reduction target as set out in the Climate Law is divided according to each field of action (renewable energies, energy reduction, limiting air emissions, etc.). Climate transition legislation is thus largely dominated by numbers. This mode of governance by objectives is rooted in international law and particularly the fight against climate change.[24] Governance by numbers seems to be a general feature of today's societies,[25] using quantified targets seeking the effective achievement of quantified objectives. Mobilising numbers is thus conceived a means of reinforcing the effectiveness of policies. Whereas this mode of governance is evidently rather straight forward, leaving little room for concepts with an indeterminate content, it does raise questions in terms of the relationship with the norm. This, in turn, has consequences for the drafting of standards and their implementation.

Firstly, it means that scientific data must be closely considered, and experts must be

19 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), PE/27/2021/REV/1, OJ L 243, 9.7.2021, pp. 1–17.

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a policy framework for climate and energy in the period from 2020 to 2030, COM/2014/015 final.

21 Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) N° 525/2013 and Decision N° 529/2013/EU PE/68/2017/REV/1, OJ L 156, 19.6.2018, pp. 1–25.

22 The sector is responsible for more than 11% of the gas emissions. See also Savaresi, A., Perugini, L., Chiriaco, M.-V., "Making sense of the LULUCF Regulation: Much ado about nothing?", *RECIEL* 2020, vol. 29, pp. 212–220.

23 Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, COM/2006/0232 final - COD 2006/0086. A new proposal is pending since recently (Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law), COM/2023/416 final.

24 See Kyoto Protocol.

25 Supiot, A., *La Gouvernance par les nombres*, 2015, Paris, Fayard.

involved in the decision-making process.[26] The drafting of legislation must have a dynamic dimension and must be able to evolve in line with scientific knowledge. Besides, implementation involves monitoring both the results and scientific developments, revising the objectives where necessary.

Secondly, the promotion of quantified targets allows for greater flexibility at the stage of national implementation. Member States are bound to achieve the set objectives, particularly in terms of reducing emissions or developing renewable energies but are given the freedom to determine the means and public policies to be implemented to achieve them. This also constitutes a form of solidarity between Member States. Indeed, regulating by figures allows for an individualisation of objectives, while at the same time promoting a global common approach. This becomes particularly evident in the Effort Sharing Regulation, initially adopted in 2018 and amended in 2023.[27] The Regulation provides for objectives of emission reduction adjusted to each Member State, in order to contribute to the European objective of 55% by 2030. The Regulation recognises the different capacities of Member States to take action by differentiating targets according to Gross Domestic Product (GDP) per capita across Member States.[28] The latter seems relevant since the level of emissions is closely linked to the level of economic wealth.[29] Flexibility is further enhanced by the compensation mechanisms provided for in the Regulation, inspired by the Kyoto Protocol, particularly the possibility of borrowing, banking and transferring annual emission allocation.[30]

Regulating by objectives has significant consequences for the scope of the obligations imposed on the Member States. It appears that setting quantified targets at European level has ultimately hardened the obligations imposed on Member States, given that individuals, NGOs, and potentially others may bring actions before a national court enforcing the easily measurable objectives. In *l'Affaire du siècle* for instance[31] the French administrative judge followed a classical line of reasoning, pointing out that the Paris agreements could not be invoked since the provisions did not have direct effect under national law. Yet given that France had set a target which was evidently insufficient to reduce its energy budget, particularly in light of the objectives set by the European Union,

26 Art. 3 of Regulation 2021/1119 (Climate Law) set up the European Scientific Advisory Board on Climate Change, which “shall serve as a point of reference for the Union on scientific knowledge relating to climate change by virtue of its independence and scientific and technical expertise”.

27 Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 PE/3/2018/REV/2, OJ L 156, 19.6.2018, pp. 26–42; Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 and Regulation (EU) 2018/1999PE/72/2022/REV/1, OJ L 111, 26.4.2023, pp. 1–14.

28 It also includes Iceland and Norway which agreed to implement the Effort Sharing Regulation and commit to the binding 2030 emission reduction targets.

29 See the level of emissions per Member State: https://www.touteleurope.eu/environnement/les-emissions-de-gaz-a-effet-de-serre-dans-l-union-europeenne/.

30 See Art. 5 of Regulation (EU) 2018/842, id.

31 Administrative Tribunal of Paris, 3rd February 2021, n° 1904967-1904968-1904972-1904976.

the claim brought was ultimately successful.[32] Similarly, in *Commune de Grande-Synthe*,[33] the French Council of State found that the French government had failed to take the necessary measures to achieve the objectives set out in Decision 406/2009 and Regulation 2018/842. The measurable European targets thus clearly limit the Member States' room for manoeuvre, reinforcing the scope of the obligation to reduce emissions. The more specific the targets are, the easier it is to argue that they have not been achieved.

Another feature of the European regulatory approach of climate transition is the use of soft law, such as guidance documents.[34] Here again, the development of soft law is not exclusively specific to this field or to the European Union's legal system in general. Soft law fulfils different functions, ranging from agenda-setting to policy-steering. The use of soft law is "highly valuable in the technically, scientifically and politically complex field of environmental law at large or climate change law in particular", soft law instruments offer "efficient and adaptative policy solutions".[35] Despite a missing normative dimension in the traditional sense of the term,[36] soft law instruments are standards that are followed and regulate the field of climate change, particularly at the stage of implementation at national level. [37] Indeed, because of the wording of soft law norms, they provide a framework for national authorities,[38] inviting national judges to "take into consideration soft law whenever deciding on cases".[39]

In addition to blurring the boundaries between hard law and soft law, the regulation of the fight against climate change also has the effect of blurring the homogeneous dimension of sources of law in general. Indeed, it is a privileged field for the development of standards and labels, as a regulatory technique. Initially used to reinforce the effectiveness of the internal market, the use of standards in the EU has generally increased

32 The applicants invoked Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, pp. 136–148 and Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, pp. 1–56.

33 Council of State, 19 Nov. 2020, N° 427301, *Commune de Grande-Synthe*, ECLI:FR:CECHR:2020:427301.20201119.

34 For an overview of the soft law instruments used in the field of climate transition, see Petropoulou Ionescu, D., Eliantonio, M., "Soft Law Behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change", *European Journal of Risk Regulation*, 2023, pp. 292-312.

35 Petropoulou Ionescu, D., Eliantonio, M. (2023), "Soft Law Behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change", op. cit. p. 292.

36 Senden, L., "Soft Law in European Community Law", London, Bloomsbury Publishing, 2004. Soft law instruments are a form of hard obligation/soft enforcement, see Terpan, F., "Soft Law in the European Union", European Law Journal 2015, vol. 21, pp. 68-96.

37 Korkea-Aho, E., "EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?", *Maastricht Journal of European and Comparative Law* 2009, vol. 16, issue 3, pp. 271–290; Láncos, P. L., The Many Facets of EU Soft Law, 2022, Budapest, Pázmány Press.

38 Petropoulou Ionescu, D., Eliantonio, M., "Words Are Stones: Constructing Bindingness Through Language in EU Environmental Soft Law", in Lancós, P., Xanthoulis, N. & Arroyo Jiménez, L. (eds.), *The Legal Effects of EU Soft Law: Theory, Language and Sectoral Insights into EU Multi-level Governance,* 2023, London, Edward Elgar Publishing, pp. 76-111.

39 Stefan, O., "European Union Soft Law", Modern Law Review 2012, vol. 75, pp. 879-893.

over the recent years.[40] In this respect, standards have, at least, two objectives. Firstly, they harmonise the technical specifications applicable to certain products, goods or substances. Second, they contribute to building confidence in the internal market for civil society and ensure legal certainty and its adequate functioning for economic operators. Standards are however peculiar as they are elaborated by private actors, under the supervision of the Commission.[41] Yet economic operators, if they wish to enter the European market will have to comply with the specification's requirements applicable to each good. Environmental law might even be regarded as one of the central fields for standardisation.

Environmental standards setting technical specifications applicable to goods and services can however be seen as obstacles to free trade.[42] The European Community initially only had limited competences in environmental matters. Particular attention was then paid to define specifications aiming at safeguarding environmental interest. These environmental standards have been adopted to strengthen environmental protection or to limit the impact on the environment in the context of the liberalisation of the movement of goods and have developed on the basis of a large amount of secondary legislation. These standards embody a balancing exercise between the effectiveness of the free movement of goods and a high level of environmental protection, involving private actors in designing of norms. Standards, therefore, play a role in regulating climate change issues within the Union.[43] However, the hybrid nature of standards may rise questions of legitimacy. Due to their private nature, are they reviewable?[44] And since they are often protected by copyright, do they fall within the scope of access to information, recognizing that it is very important for consumers to know what could be expected when buying a good complying with the standards.

C. Evolution of EU law: Amending the Charter of Fundamental rights?

Even if the body of European legislation is ever increasing, effectiveness might also be improved by means of amendments or by developing new norms.

40 See the 1985 'New Approach to technical harmonization and standards' (Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJ C 136, 4.6.1985, pp. 1–9) which marked a radical shift in the EU market harmonisation policy.

41 Regulation (EU) 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ L 316, 14.11.2012, pp. 12–33.

42 Cuccuru, P., "Regulating by Request: On the Role and Status of the Standardisation Mandate under the New Approach", in Eliantonio, M. & Cauffman, C. (eds.), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis,* 2020, London, Edward Elgar, pp. 48-63.

43 See for example Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27, 30.1.2010, pp. 1–19; Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), PE/48/2018/REV/1, OJ L 328, 21.12.2018, pp. 82–209.

44 Volpato, A., Eliantonio, M., "The contradictory approach of the CJEU to the judicial review of standards: a love-hate relationship?", in Eliantonio, M. & Cauffman, C. (Eds.), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis,* 2020, London, Edward Elgar, pp. 91-110.

One of the avenues being considered here is the amendment of the Charter of Fundamental Rights. In his speech in the European Parliament in Strasbourg at the beginning the French Presidency of the Council, Emmanuel Macron proposed to give greater prominence to environmental protection in the EU's catalogue of fundamental rights, by including the objective to fight against climate change into the Charter. [45] This idea is part of several more general movements, one of which has been underway for several decades now, to link fundamental rights and environmental protection.[46] Another such movement aims to constitutionalise rights directly linked to environmental protection, such as the right to a healthy environment, which is known to most EU Member States. Constitutionalising environmental law is seen as a means to strengthen the latter's effectiveness and, ultimately, environmental protection in general.

The added value of such an evolution of the Charter of Fundamental Rights shall still be assessed. Environment is not absent from the text. Drafted at the end of the 90s, the text incorporated the so-called third-generation rights. Article 37 of the Charter of Fundamental Rights is entitled "Protection of the environment". Article 37 refers to "[a] high level of protection of the environment and the improvement of its quality must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". It is, therefore, a "principle" within the meaning of Article 51 of the Charter of Fundamental Rights, which makes its invocation conditional on its prior implementation by the legislator. It is important to stress that such an approach is not exceptional in environmental law.[47] The distinction between rights and principles undoubtedly impacts the use of Article 37. This is also why amending the Charter might not be the perfect solution either. If the Charter were to be amended as to set out the objective of combating climate change, this would have only reinforced Article 37 but would not have upgraded environmental protection to an enforceable right. Hence, the added value of such an amendment would appear to be minimal and merely symbolic. The question of feasibility is equally open to question, as the process of revising the Charter is complex and has never yet been taken.[48]

Furthermore, in the light of the development of environmental law in the European Union, the problem is not so much the fundamental nature of environmental norms, but their enforcement and effectiveness. Indeed, EU environmental law is dense and developed. The more problematic issue is that of access to and the use of legal remedies. Amending the Charter would thus have only very minor impact since EU law already

45 See: https://www.elysee.fr/emmanuel-macron/2022/01/19/discours-du-president-emmanuel-macron-devant-le-parlement-europeen.

46 Prieur, M., « Vers un droit de l'environnement renouvelé », Cahiers du Conseil constitutionnel, 2004, n° 15. Macron's proposal also echoes the proposal of the Citizens' Climate Convention, which was organized to make proposals for fighting against climate change. The Convention had proposed an amendment to Article 1 of the French Constitution, inserting a reference to the fight against climate change, stipulating that France "guarantees the preservation of the environment and biological diversity and combats climate change", see: https://propositions.conventioncitoyennepourleclimat.fr/.

47 See for example the wording of the French Charter for Environment, Chevalier, E., Makowiak, J., « Dix ans de QPC en matière d'environnement : quelle (r)évolution ? », Titre VII – Les Cahiers du Conseil constitutionnel, 2020, pp. 392-418.

48 Racho, T., « Du Green Deal dans la Charte des droits fondamentaux de l'Union européenne ? », Observatoire du Green Deal. Available at: https://www.observatoire-greendeal.eu/le-pacte-vert/du-green-deal-dans-la-charte-des-droits-fondamentaux-de-lunion-europeenne/.

includes principles that can be used to provide a framework for legislative action at the level of primary law. Article 191 TFEU forms the basis of the Union's environmental policy, and the principles set out therein are to guide the Union legislator. In the context of the fight against climate change, the polluter-pays and the precautionary principle play a major role. The latter might prove particularly relevant where there is continuing doubt as to the extent of climate change or its effects.

Of course, the weight of symbols should not be underestimated, particularly in terms of generating greater public support and therefore greater incentives for public authorities. But, given the nature of what is at stake, one should use the law with caution. One should not amend EU primary law without seriously reflecting on the effectiveness of such an amendment.

The European Union's legal system thus knows multiple means to address the issue of climate change. Obviously, the EU's response to the climate challenge has been significant, and the diversity of its actions enables it to tackle the issue in a systemic way. However, the body of legislation is dense and complex. For example, regulating by means of explicit targets allows for a definition of Member States' obligations, so as to create a form of solidarity. However, despite the apparent clarity of the figures, the system is difficult to understand. Determining the thresholds is based on a scientific process; the reference years are not always the same, often 1990, sometimes 2005 but also others. Moreover, the normative scope of European rules cannot be assessed as monolithically as in a unified legal order. The binding nature of European Union law is not called into question, nor is its authority. Nevertheless, certain features stand out which confirm the enrichment of the approach to normativity, and which reflect a desire to guarantee a certain form of flexibility at the stage of implementation of the rules drawn up by the Union. Such complexity and density do not rule out the legitimacy of the European Union's action in this area. Here again, a study of existing or developed administrative mechanisms enables us to assess the extent to which this issue is sufficiently taken into account.

II. Establishing legitimacy for EU climate action

Establishing legitimacy for the Union's action is a central issue. The objectives set by the European Union are ambitious, and the constraints on both Member States and economic systems are considerable. To achieve the necessary changeover, it is vital that the measures are accepted and acceptable. It is therefore essential to consider the legitimacy and acceptance of the measures adopted. The legitimacy of an action or an institution can be assessed in different ways. Firstly, it is essentially based on compliance with the law. Max Weber adds respect for tradition (traditional legitimacy) and respect for the leader (charismatic legitimacy). While the legitimacy of the Union's action could be based on a charismatic approach, relying on the reputation and influence of the European Union, this might ultimately be insufficient. Similarly, limiting the quest of legitimacy to evaluating the implementation of classic democratic processes would necessarily be limited.

The Union has long been accused of a democratic deficit. However, in the context of an international organisation, one may wonder whether the EU's decision-making procedures can be evaluated by the same yardsticks as national systems. The European Union is not exclusively based on representative democracy. Instead, its democratic foundation is further complemented by instruments of participatory democracy, as well as administrative law mechanisms which allow for the action of political decision-makers to be monitored, notably via the right of access to information and participation, as well as the right of access to the courts.

A. Access to information and participation

Over the last few decades, the European Union has developed and deepened the mechanisms of good governance, following the example of the Member States. As the issue of combating climate change falls within the scope of environmental policy, those developments have been widely grounded on Aarhus Convention[49] and on the secondary EU law implementing the latter.

Firstly, public participation in the field of environmental protection has been largely developed on the basis of the second pillar of the Aarhus Convention. Generally speaking, citizens are given multiple means to participate in climate change issues, which are central to the definition of new modes of governance of climate transition.[50]

Regulation 1367/2006 grants a right to participation to the public, which has been interpreted to include "one or more natural or legal persons, and associations, organisations or groups of such persons".[51] Notably however, participation is limited to the adoption of administrative decisions. At the same time, despite the fact that the personal scope of the Regulation – covering the aforesaid public – in reality participation is limited to those concerned and not the average citizen. These interested parties are mainly economic operators, industrialists and stakeholders.[52] Admittedly, NGOs have been playing an increasingly significant role. However, participation seems too limited to overturn the very technocratic nature of the decision-making process on climate change. Decision-making in this area is largely controlled by both decision-makers and experts.[53] However, in the fight against climate change allowing for participation is one of the essential mechanisms to establish and ensure legitimacy of the decisions adopted and the choices made in public policy.

The right of access to information is a fundamental right[54] which seems particularly crucial in environmental matters. The EU`s ratification of the Aarhus Convention reinforced the originality of the legal regime of access to information in relation to EU rules on access to documents.[55] The first notable distinction between access to information and access to documents concerns the personal. Whereas access to information is granted to any individual "without discrimination as to citizenship, nationality or residence and, in

49 Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998, ratified by the EU by the Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.5.2005, pp. 1–3.

50 Armeni, C., Lee, M., "Participation in a time of climate crisis", *J Law Soc.* 2021, vol. 48, pp. 549– 572.

51 Article 2 of Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13–19.

52 Armeni, C., Lee, M. (2021), "Participation in a time of climate crisis", op. cit.

53 See for example the creation of the European Scientific Advisory Board on Climate Change. On access to participation in EU administrative law, see Mendes, J., Participation in EU Rule-Making: A Rights-Based Approach, 2011, Oxford, Oxford University Press; Chevalier, E., "La procédure administrative non contentieuse", in Auby, J.-B., Dutheil de la Rochère, J. (eds.), Traité de Droit Administratif Européen, 2022, 3e ed., Bruxelles, Bruylant-Larcier, pp. 117-139.

54 Article 42 of the Charter of Fundamental Rights.

55 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43–48.

the case of a legal person, without discrimination as to where it has its registered office or a real centre of its activities",[56] access to documents is limited to Union citizens and natural and legal persons residing or having their registered office in a Member States.[57]

Furthermore, since EU rules, based on the Aarhus Convention, aim to guarantee the widest possible access, the exceptions to access to environmental information has been interpreted strictly.[58] Information held by public authorities, especially in environmental matters, is often considered sensitive, not only because of the knowledge it provides about the impact of activities on the environment, but also because it may relate to private activities and potentially include industrial and commercial secrets or personal data. The access to information depends therefore largely on the definition of the exceptions to access.

Exceptions to both the right of access to documents and to information in general are formed by the need to reconcile this fundamental right with other fundamental rights guaranteed by Union law, such as the right to protection of personal data, the right to respect for professional secrecy, etc. At the same time in granting access to documents or information [59] the right to privacy,[60] and interests, such as respect for public order or State security need to be respected. Article 6 of Regulation 1367/2006 refers to Regulation 1049/2001 in order to define the exceptions that may be invoked to requests for access to environmental information.[61] Due to the fundamental nature of the right of access, any exception must be interpreted strictly and be proportionate to the objective pursued. However, Article 6 of Regulation 1367/2006 emphasizes the specific nature of the interpretation of exceptions in environmental matters. Not all the exceptions provided for in Article 4 of Regulation 1049/2001 are treated in the same manner. Thus, exceptions aiming to protect commercial interests or the conduction of inspection, investigation and audit activities (Article 4(2) first and third indents), can hardly be successfully invoked when it comes to the disclosure of information relating to emissions as such information will often be considered to be in the public interest. Moreover, the other grounds for refusal "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment".[62]

The European Court of Justice has been sympathetic to taking into account the specific nature of environmental information, particularly in the context of climate change. However, in practice the European administration often seems to struggle to grant access to information. The Court in turn lacks the power to issue injunctions in actions for annulment or even actions for failure to act. [63] Yet it seems that the Court has been largely ignoring the impact of this lack of power on the effectiveness of access to environmental information, which should be understood as giving individuals the possibility to exercise

56 Article 3 of Regulation n°1367/2006, id.

57 Article 42 of the Charter of Fundamental Rights.

58 T-189/14, 2017, *Deza v Agence européenne des produits chimiques*, ECLI:EU:T:2017:4 ; C-673/13P, 2016, *Commission v Stichting Greenpeace Nederland et PAN Europe*, ECLI:EU:C:2016:889.

59 Art. 339 TFEU.

60 Art. 7 of the Charter of Fundamental Rights.

61 Art. 4 of Regulation 1049/2001.

62 Art. 6 §1 of Regulation 1367/2006.

63 Art. 265 TFEU.

control over the decision-making process.[64]

The case law concerning access to documents relating to European policy on the development of biofuels illustrate the administrative imbroglio applicants might face when seeking access.[65] Environmental NGOs sought access to a series of documents dealing in particular with the impact of the development of biofuels on soil and the preparatory reports from the Commission. As the Commission did not act upon the request, the applicants appealed to the General Court against the refusal of access. While the judgement was pending, the Commission issued a decision granting partial access to the documents requested and refusing access to the other documents on the basis of the exception relating to the protection of commercial interests. This new decision led to the withdrawal of the implied refusal, and therefore rendered the action for annulment inadmissible. In the meantime, the European Ombudsman considered that the Commission had been guilty of maladministration by not giving access to the documents requested within the time limits laid down.[66] Equally the European Parliament's Committee on Civil Liberties, Justice and Home Affairs urged the Commission to publish "scientific studies, for example, on the repercussions of biofuels".[67] In retrospect it might hence be obvious that the information should have been made available not only to the applicant NGOs, but also to the public at large. Yet the pressure of multiple institutions was needed for the Commission to comply.

A similar case illustrates the complexity of implementing the right of access procedure when the Commission does not actually wish to communicate the information. In another *ClientEarth* case,[68] a group of NGOs had requested access to information relating to a certification aimed at guaranteeing the sustainability of biofuels. Once again, the Commission did not respond to the request within the time limit prescribed. With no response, the NGOs exchanged numerous letters with the Commission, which suggested that the NGOs would not have access to the information requested. This information concerned the competence of the experts in charge of the certification process. The NGOs lodged an action for annulment before the General Court. However, the two-month time limit to start an action[69] had expired, so their application was deemed inadmissible. The applicants then invoked the Commission's failure to respond, which was equally considered inadmissible, as compliance with the time limits for appeals is considered a ground ex officio. The NGOs finally received the requested information in September 2011, eleven months after their initial request (October 2010), but especially after the Commission had adopted a decision on voluntary certification. The Commission's failure to act clearly affects the practical enforcement of the right of access to information. The latter is thereby largely confined to a power of knowledge, preventing NGOs from exercising their control function during the decision-making process, even though the involvement of NGOs is all the more necessary given that climate policy is a delicate

64 See Recital 2 of Regulation 1367/2006.

65 T-120/10, 2011, ClientEarth e.a. v European Commission, ECLI:EU:T:2011:646.

66 Decision of the European Ombudsman closing his inquiry into complaint 339/2011/AN against the European Commission.

67 Report of the European Parliament– Commission of civil liberties, justice and internal affairs of 24 June 2011 on access to public to documents, 2010/2294(INI).

68 T-278/11, 2012, *ClientEarth e.a. v European Commission,* ECLI:EU:T:2012:593.

69 Art. 263 §6 TFEU.

issue, involving political choices, and therefore greater control at the decision-making stage in an area that is highly sensitive and of great public interest.[70]

B. Access to court

It is now widely recognised that courts play a vital role in the fight against climate change. They are called upon by citizens to monitor the actions of public authorities in this area. Courts at any level of the hierarchy are most often the watchdogs of government's inaction reinforcing the latter's obligations.[71]

Access to courts and the right to an effective judicial protection are fundamental rights under Union law.[72] In a Union based on the rule of law every individual subject to Union law should have access to court to challenge a Union act or an act adopted by a national authority implementing Union law. According to settled case law, the Union is based on 'a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts.'[73] That is to say that an individual will not automatically be granted standing in front of the CJEU, but remedies in this sense might also be granted by national courts. This line of reasoning allows the Court of Justice to take a restrictive approach in assessing the legal interest in bringing an action for annulment.[74] However, this restrictive approach is not compatible with the 3rd pillar requirements of the Aarhus Convention,[75] and the amendment of Regulation 1367/2006 does not really change that.[76] The latter amendment is mainly concerned with the internal review stage and aims to strengthen NGOs' legal standing, without calling into question the previous

70 Peeters, M., Nóbrega, S., "Climate change-related Aarhus conflicts: how successful are procedural rights in EU climate law?", *Review of European Community and International Environmental Law* 2014, vol. 23, issue 3, pp. 354-366: *«Without proper and timely access to information, civil society will be prevented from checking and commenting upon the quality of climate policies»*.

71 Torre-Schaub, M., (dir.), *Les dynamiques du contentieux climatique, Rapport final de recherche,* 2019. Available at: http://www.gip-recherche-justice.fr/wp-content/uploads/2020/01/17.05-RF-contentieux-climatiques.pdf.

72 Article 47 of the Charter of Fundamental Rights, see also Article 6 ECHR.

73 C-583/11P, 2013, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union,* ECLI:EU:C:2013:625.

74 Art. 263 TFEU; 25/62, 1963, *Plauman & Co. v Commission of the European Economic Community,* ECLI:EU:C:1963:17.

75 Betaille, J., « Accès à la justice de l'Union européenne, le Comité d'examen du respect des dispositions de la Convention d'Aarhus s'immisce dans le dialogue des juges européens : à propos de la décision n° ACCC/C/2008/32 du 14 avril 2011 », *Revue juridique de l'environnement* 2011, pp. 547-562. See also Economic Commission for the UN in Europe, "Findings and recommendations of the Compliance committee with regard to communication ACC/C/2008/32 (Part II) concerning compliance by the European Union", 17 March 2017. This issue has been widely debated by the academics: see de Sadeleer, N., Poncelet, C., "La contestation des actes des institutions de l'Union à incidences environnementales à l'épreuve de la Convention d'Aarhus", R.T.D.eur. 2014, pp. 7-34; Schoukens, H., "Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?", *Utrecht Journal of International and European Law* 2015, vol. 31, issue 81, pp. 46–67; van Wolferen, M., Eliantonio, M., "Access to Justice in Environmental Matters: The EU's Difficult Road Towards Non-Compliance With the Aarhus Convention", in Peeters, M. & Eliantonio, M. (eds.), *Research Handbook on EU Environmental Law,* 2020, London, Edward Elgar, pp. 148-163.

76 Brosset, E., « Enfin ! le règlement Aarhus est révisé : un nouveau pas l'accès à la justice en matière environnementale ? », *Revue des Droits et Libertés Fondamentaux* 2022, chron. n° 5. Available at: https://revuedlf.com/droit-ue/enfin-le-reglement-aarhus-est-revise-un-nouveau-pas-lacces-a-la-justice-en-matiere-environnementale/.

case law in this respect.[77] Consequently, there are fewer opportunities to challenge and discuss the choices made at European Union level, choices which are decisive for national public policies. As a result, applicants even though active in climate litigation have been refused standing for lack of interest in bringing an action.

Next to NGOs, sub-national authorities, particularly cities, have been able to lodge appeals to challenge climate legislation.[78] The interest of cities in taking action, which is not the same as that of Member States which are privileged applicants, is assessed by reference to of direct concern, according to which "a regional or local entity is affected by an act of the Union when it is vested with competences which are exercised autonomously within the limits of the national constitutional system of the Member State concerned and the act of the Union prevents it from exercising those competences as it sees fit".[79] The local authority is therefore considered to be directly concerned if the Union act interferes with the exercise of one of its competences, for example if measures adopted by the local authority would be limited by the requirements of a Union norm.[80] However, such a conception remains restrictive for access to the Union's courts. In its judgment of 13 December 2018, the General Court ruled on an action for annulment brought by the City of Paris, the City of Brussels and the Ayuntamiento de Madrid against Commission Regulation (EU) 2016/646 of 20 April 2016,[81] which is intended to "supplement" the requirements for tests under real driving conditions designed to measure the polluting emissions of passenger cars and light commercial vehicles as part of the authorisation procedures to place new vehicles on the market. The Court held that "the fact that an act of the Union prevents a public legal person from exercising its own powers as it sees fit directly affects its legal position and that, consequently, that act is of direct concern to it" (paragraph 50). Thus, direct concern is to be assessed in relation to the normative competences of the local authority. Since the adoption of the Regulation, the local authorities couldn't restrict, in the context of a measure which takes into account the levels of pollutant emissions from vehicles, the movement of vehicles even if they don't comply, during the RDE tests, with the limits for emissions of nitrogen oxides laid down in the Euro 6 standard. And this could be regarded as preventing them from protecting the environment and health, which are of their competencies, in particular to combat air pollution, including the power to restrict motor traffic for that purpose. Cities' competences are thus directly affected by Union legislation in this policy area. However, this favourable interpretation of standing requirements for cities was not upheld by the ECJ on appeal. The latter set aside the GC's judgment and confirmed a more restrictive interpretation of admissibil-

77 See Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (PE/63/2021/REV/1), OJ L 356, 8.10.2021, pp. 1–7.

78 Alogna, I., Clifford, E., *Climate Change Litigation: Comparative and International Perspectives, British Institute of International and Comparative Law,* 2021. Available at: https://www.biicl.org/documents/88_climate_change_litigation_comparative_and_international_report.pdf.

79 T214/95, 1998, *Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

80 Joined Cases T-339/16, T-352/16 and T-391/16, 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v Commission,* ECLI:EU:T:2018:927, §50.

81 Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) C/2016/1792, OJ L 109, 26.4.2016, pp. 1–22.

ity criteria.[82]

The same approach is taken in cases of claims brought by individuals. As mentioned above, the assessment of an individual's interest in bringing an action is rather strict, which undeniably limits the scope of bringing climate actions in front of the Court of Justice of the European Union. That being said, it can of course not be ruled out that occasionally the mere fact of bringing a case to Court, well aware of the former's inadmissibility, might serve a strategic purpose by itself (eg media coverage).[83] The two climate-related actions brought by individuals before the Court of Justice are worth pointing out here. The applicants had challenged the legality of EU standards and specific policy choices directly related to the management of climate transition.

In *Sabo*,[84] the applicants sought the annulment of several provisions of Directive 2018/2001 on the promotion of the use of energy from renewable sources, which allows energy from forest biomass to be considered a renewable energy source. According to the applicant such inclusion could lead to an increase in the production of greenhouse gas emissions. In *Armando Carvalho* [85] numerous Union citizens, from Germany, France, Italy, Portugal and Romania, together with third-country nationals (Kenya, Fiji) and an NGO representing Samis young people, argued that the Union's objective of reducing emissions by at least 40% by 2030 was insufficient, in breach of the Paris Agreement and several fundamental rights as set out in the Charter, such as the right to life, the right to health and the right to property. They eventually sought the annulment of several provisions of the Energy and Climate Package,[86] and sought damages in the form of an injunction, even though the CJEU does not even hold the competence to grant such a remedy. They asked the ECJ to order the EU to adopt and implement more stringent measures to reduce GHG emissions. They also considered that the no-debit rule enshrined in the LULUCF Regulation fails to create an incentive for the EU to increase its sink. They also specifically criticised the flexibility arrangements, maintaining that they had an effect of 'diluting' the targets set by the CAR. In the action for damages, instead of monetary compensation for their individual losses, they sought compensation in the form of an injunction ordering the EU to adopt measures to put an end to its unlawful and damaging conduct, i.e. to order the Council and the European Parliament to adopt measures to impose a reduction in greenhouse gas emissions of between 50% and 60% of

82 Joined cases C-177/19P to C-179/19P, 2022, *Federal Republic of Germany v. European Commission,* ECLI:EU:C:2022:10.

83 Boyer-Capelle, C., Chevalier, E. (eds.), *Contentieux stratégique – Analyses sectorielles,* 2021, Paris, LexisNexis.

84 C-297/20P, 2021, *Peter Sabo and Others v European Parliament and Council of the European Union,* ECLI:EU:C:2021:24.

85 C-565/19P, 2021, *Armando Carvalho and Others v European Parliament and Council of the European Union,* ECLI:EU:C:2021:252.

86 Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, OJ L 76, 19.3.2018, pp. 3–27; Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, pp. 26–42; Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) n° 525/2013 and Decision No 529/2013/EU, OJ L 156, 19.6.2018, pp. 1–25.

1990 levels. The Court did not consider the applicants to be individually concerned in the sense of Article 263 TFEU and thus dismissed both actions as inadmissible. Given the aforementioned settled line of case law these rulings are hardly surprising. Yet they once again illustrate the incompatibility of the strict interpretation of standing requirements with the challenges raised by the climate crisis.

In the context of the EU, which continues to struggle with allegations of a democratic deficit, direct access to EU judges would be crucial to review EU action. The ECJ justifies its stance with reference to the indirect means to challenge Union acts – eg preliminary rulings on validity.[87] This argument is of course open to debate given that preliminary rulings are quantitatively limited and depend on the national court's willingness to refer to the question to the CJEU. Even when the question is referred, it is quite exceptional that the Court of Justice declares an EU norm invalid in this context. Consequently, it may be difficult to consider the indirect review as a way to compensate the strictness of the conditions of access to court.

Conclusion

The climate emergency has forced the European Union to trigger a pro-active normative movement, guided by international commitments some might even say legislative inflation at the EU level. While some of the Union's solutions and mechanisms mirror national solutions, the specific context in which they are deployed creates certain particularities. The European Union is governed by the principle of conferral, which evidently limits its scope for actions. Given the lack of Union competence, the latter will hardly be able to address one major challenge of the climate transition: the management of vulnerabilities. At the same time, the climate crisis operates like a mirror that imposes reflexivity on the mechanisms of the European Union's legal order. This is a special time for public action.[88] The Union's legal order seems to be based on a solid procedural basis, which can provide a basis for individuals to develop ways of monitoring the actions of public authorities. However, the adequacy of these mechanisms to the challenges of the climate crisis remains a central issue. The example of the European Union shows above all is that there are no magic solutions, but effectively addressing the climate crisis calls for the development of certain paths, mobilizing different actors at different times.

At the same time the European approach illustrates the importance of a systemic approach. One line of action, one measure in itself, is not enough. Individual measures form part of a global movement, and their effectiveness will widely depend on the context in which they are implemented. While the European Union was set up to preserve peace between European states, and the initial objective of the Union was the creation of a single market, the Union underwent a major transition and nowadays also faces problems such as the climate transition, which evidently goes beyond mere economic integration. The European Union's action illustrates the challenges faced by public authorities in general while dealing with climate transition. Any public entity is facing problems

87 C-50/00P, 2002, *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462.

88 Armeni, C., Lee, M. (2021), "Participation in a time of climate crisis", op. cit., p. 549; Jodoin, S., Duyck, S., Lofts, K., "Public Participation and Climate Governance: An Introduction", *Review of European, Comparative & International Environmental Law* 2015, vol. 24, pp. 117-122; Lindsay, B., 'Climate of Exception: What Might a "Climate Emergency" Mean in Law?', *Federal Law Review* 2010, vol. 38, pp. 256-281.

of time and to some extent of creativity. It is then the responsibility of legislator, judges, and also academics to give the necessary impulses to facilitate the realization of at least certain aspects of the global solution.