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Chapter II

SUSTAINABILITY, THE PRINCIPLE OF ENVIRONMENTAL INTEGRATION IN EU LAW, AND THE LEGAL FORM OF PLANNING ACTS

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Abstract

This chapter argues that the integrated approach, as an inherent aspect of sustainable transformation of socio-economic life, raises vital theoretical challenges for the contemporary legal system. These can be examined with help of the responsive law paradigm. Presently, public planning at EU level, motivated by environmental goals, is an area that may be used for the purpose of illustrating the trials of 'greening' the theory of sources of law. The search of cohesion between policy and law is reflected in the planning act, which is a formal result of law-making activities integrating human development and environmental protection. The chapter attempts to identify and comment on the two key models of planning acts functioning in EU law. Simultaneously, it endeavours to critically assess the state of affairs in that regard after the enactment of the European Green Deal in 2019.

I. INTRODUCTION

There are undoubtedly many dimensions of the principle of environmental integration (Article 11 TFEU).[1] One of its key aspects is the impact of the concept of sustainable development on the contemporary legal system. The system is clearly in the process of transitioning from autonomous to responsive law.[2] In other words, the shift from legal formalism and the model of rules leads to 'purposive law', which is result-oriented. This characteristic applies to EU law in general, but the recognition of this principle contributes to the acceleration of the transition. Goal-driven acts like the EU Green Deal[3] signify this change in law-making activities at the EU level. In the light of this development, an additional problematic aspect can be observed. As the name suggests, the principle requires the integration of environmental protection into EU policies and activities. In reality this currently means that the law is directly subordinated to the policy and its goals. In the face of such a challenge, the EU legislator uses plans as tools providing an opportunity for achieving the aforesaid

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.
[2] Ph Nonet, Ph Selznick and RA Kagan, *Law and Society in Transition: Toward Responsive Law* (New York, Routledge, 2001) 16.
[3] European Commission, Communication: *The European Green Deal*, COM/2019/640 final, eur-lex.europa.eu; cited as: EGD.

integration, as well as cohesion between EU policy's goals and the law. However, the transition towards responsive law in the light of Article 11 TFEU cannot move forward without a proper reflection on the nature of legal instruments such as plans (planning acts).

The planning of social life is an issue of a multidimensional and interdisciplinary nature. From the legal perspective it can be noticed that, currently, the key challenge is to establish the status of plans (planning acts) within the logic of a 'sustainable' legal system. Thus, the theory of legal sources can be indicated as a good starting point for the discussion concerning plans and their role in implementing the principle of environmental integration in EU law. The proliferation of planning acts (general, sectoral, environmental) during sustainable transformation is the direct result of the policy-making process based on this principle. Of particular use for the analysis of that issue is the division of the sources of law into:

1. 'substantive sources of law', i.e., socio-political factors that shape the content of the legal norms of a given system;
2. 'formal sources of law', i.e., facts that are recognised in a given legal system as law-making facts.[4]

The notion of a 'planning act' should be associated with the second category of sources, simultaneously assuming that this is an act integrating policy goals (especially in regard to change, resource or risk management), in a way that is consistent with the concept of responsive law. By assessing the manner in which the EU legislator uses planning acts, it can be noticed that the main purpose of those acts is to integrate legal and political aspirations at the EU level in regard to sustainable transformation.

The consequences of such a state of affairs are multidimensional. With regard to the legal system, it exposes the current extent of its 'greening' process. The basic question about the status of a planning act as a source of law reopens the discussion about the democratic legitimacy of planning as a so called legal form of public administration activity. On the one hand, this problem needs a new assessment in the light of such fundamental values as the rule of law, the principle of legal certainty, and protection of people's rights and freedoms. On the other hand, the issue of public participation in environmental matters reveals the existing deficiencies of a planning act as a legal instrument, especially with regard to public participation in decision-making (e.g., during strategic environmental assessment) and access to justice (e.g., the legal standing of members of the public, including environmental organisations, before the national courts of an EU Member State).

In the case of the EU legal system, owing to its specificity, the phenomenon of the proliferation of planning acts has a bi-level nature. Thus, in the context of EU law, planning acts can be divided into two main categories:

1. acts adopted by the public authorities of a Member State within the obligations resulting from EU law;[5]

[4] Z Ziembiński, 'The Normative Conception of the Sources of Law' in P Kwiatkowski, M Smolak and S Dersley (eds), *Poznań School of Legal Theory* (Leiden-Boston, Brill, 2020) 38.

[5] In case of such planning acts, the issue of their legal form is one of the key aspects alongside the application of EU law in the domestic context (e.g., the correct transposition of EU obligations by a Member State and the recognition of principles of direct effect and effective judicial protection) and the rights guaranteed to individuals (e.g., substantive or procedural environmental rights). In Poland, at present, Air Quality Plans (Article 23 of the Directive 2008/50/EC of the

2. acts adopted by EU institutions in the form of legally binding secondary law acts or soft law acts.

Interestingly, the analysis limited only to the second category allows to formulate general observations and conclusions on the status of planning acts in the legal system, which is influenced by the processes resulting from the transformation towards sustainable development. As a result, those findings may be equally useful within research directly concerning the 'greening' of the legal system of an EU Member State.

II. SUSTAINABLE DEVELOPMENT AND THE INTEGRATED APPROACH

Planning is an activity that has always been present in human life. In the most general sense it is characterised as 'the systematic management of assets', involving *inter alia*: 'the identification of the primary objective in the pursuit of which assets are to be managed; …the integration of several streams of decisions which determine how assets are to be used in the achievement of the objectives posed', as well as the element of time (because 'assets are managed not only for the current income which they provide').[6] Planning may also be described as

> 'the process by which we attempt to shape the future. The future, in this definition, refers to anything beyond the present; the purpose of planned action may be as short-run as one's projected activities for the rest of the day or as long-run as the conservation of an important natural resource for the benefit of future generations. …The opposite of planning is aimless drift, and few individuals or organizations would want to entrust their futures to such a process when other options are available'.[7]

In the analytical aspect, the attempt to determine the nature of planning as a social activity is made within the theory of planning. It is indicated that its domain 'includes all statements which relate the attributes of planning processes, the settings in which they are applied and their outcomes'.[8]

Empirical observations confirm that planning of socio-economic life in a modern state is a task performed by public authorities in a deliberate and systematic way. This state of affairs then has its reflection in administrative law scholarship, within which attempts are made to develop theoretical foundations of public planning as a task performed by a state.[9] Engagement in such a task, which transforms socio-economic life within constitutional liberal democracy, inevitably leads to the necessity of confronting public planning with the rule of law. In this context, it is worth recalling the concept of 'jurisprudence of planning' understood as the combination of:

European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1) may serve as an example of such a challenge for legislative, executive and judicial powers (e.g., see: Case C-336/16 *European Commission v Poland*, ECLI:EU:C:2018:94, [2018] Court reports – general; and also: A Warso-Buchanan and M Jakubowski, 'Programy ochrony powietrza – prawo do sądu (w świetle orzecznictwa Trybunału Sprawiedliwości oraz sądów krajowych)' (2020) 10 *Europejski Przegląd Sądowy* 45–51). In September 2022, the Commission issued a reasoned opinion (TFEU, art 258) calling on Poland to remove barriers on access to justice in relation to Air Quality Plans – see: INFR(2020)2105.

[6] NW Chamberlain, 'Private and Public Planning' (1971) 31(3) *Public Administration Review* 382, 383.

[7] MP Brooks, *Planning Theory for Practitioners* (New York-London, Routledge, 2017) 9.

[8] SJ Mandelbaum, 'A Complete General Theory of Planning is Impossible' (1979) 11(1) *Policy Sciences* 59, 67.

[9] K Wlaźlak, *Racjonalność planowania w prawie administracyjnym* (Warszawa, Wolters Kluwer, 2015) 21–22.

1. 'the theory *about* the law of planning – the descriptive and conceptual analysis of the law regulating planning' and
2. 'the theory *of* the law of planning – the normative exploration of the relationship of the law of planning to justice'. [10]

The need for the analysis of such a defined area of social activity was justified by

> 'the rapid rise in the number and influence of planners, most of whom have a technique-oriented perspective and are busy developing functional plans which frequently ignore issues of justice, freedom and the creation of viable communities. …[T]he development of sciences and their application through planning results in the massive but silent reallocation of power. The activities of planners resulting from this reallocation may only be properly channelled through legal processes which are guided, in turn, by a jurisprudence of planning'.[11]

Four 'vital social functions' of public planning are identified. Thus, this process:

1. provides the data needed for effective public and private decision-making;
2. promotes the common or collective interests of the community, particularly with respect to the provision of public goods;
3. attempts to remedy the negative effects of market actions;
4. considers the distributional effects of public and private action, and attempts to resolve inequities in the distribution of basic goods and services.[12]

In this light, in the case of common good such as the environment, it becomes clear why such understood public planning was relatively early acknowledged as 'an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment' (Principle 14 of 1972 Stockholm Declaration).[13] Thus, in the context of the Stockholm Declaration it may be recognised that the 'integrated approach' was already present in this act. Its Principle 13 indicated that

> 'in order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the environment for the benefit of their population'.

In the period after 1972, that approach became the main starting point for the implementation of sustainable development. In the Brundtland Report in 1987 it was observed in this scope that

> 'economics and ecology must be completely integrated in decision making and law making processes not just to protect the environment, but also to protect and promote development. …What is required is a new approach in which all nations aim at a type of development that integrates production with resource conservation and enhancement, and

[10] RO Brooks, 'A Jurisprudence of Planning: Notes on the Outline of Law Required to Support and Control Planners' (1978) 24(1) *The Catholic Lawyer* 1, 4.
[11] Ibid.
[12] MP Brooks, *Planning Theory* (2017) 51–53.
[13] Report of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972, A/CONF.48/14/Rev.1, 4.

> that links both to the provision for all of an adequate livelihood base and equitable access to resources'.[14]

Whereas, Principle 4 of the 1992 Rio Declaration on Environment and Development declared that 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.[15] The above examples clearly illustrate that the 'integrated approach' is currently an indispensable element of the transformation of socio-economic life towards sustainable development,[16] and therefore an equally important component of the law-making process.

The theoretical perspective of the 'integrated approach' requires interdisciplinary research. In legal scholarship this task continues to be problematic. The current state of affairs within this scope might be shortly described by the phrase 'I know it when I see it'. The analysis of the legislator's activity provides several examples confirming the employment of this approach in the law-making process in general, as well as strictly in regard to environmental protection. On this basis, it can be stated that 'greening' of the legal system with the use of this approach, resulting explicitly from the concept of sustainable development, has been taking place for a long time. Nevertheless, the search for a legal definition of the 'integrated approach' reveals current shortages in theoretical legal scholarship (both in EU and Polish law) and in research conducted in other social sciences.[17] Addressing them would require methodology that can provisionally be described as the legal version of 'reverse engineering', i.e., the process of the disassembly and detailed examination of a system in order to uncover the concepts involved.

Taking all this into account, it should be acknowledged that the general legal basis of the 'integrated approach' in a given legal system are those provisions of positive law referring to sustainable development. Because it is from this system-wide value that the principle of environmental integration (or the integration principle) is subsequently derived. Thus, at the EU law level, the starting point is Article 11 TFEU, according to which 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. The ruling of the European General Court in Case T-719/17 may serve as an example of how this article of the Treaty is interpreted. Thus, according to the EGC

> 'giving concrete expression to that obligation,[18] Article 114(3) TFEU provides that, in its proposals concerning, *inter alia*, environmental protection, made on the basis of the approximation of laws which have as their object the establishment and functioning of the internal market, the Commission will take as a base a high level of protection, taking account in particular any new development based on scientific facts... That protection

[14] Report of the World Commission on Environment and Development: *Our Common Future*, Chapter 1, paras 42 and 47, UNGA A/42/427, 4 August 1987, 48–49.
[15] Report of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26/Rev.l (vol l), 4.
[16] A Lenschow, 'Greening the European Union: An Introduction' in A Lenschow (ed), *Environmental policy integration: greening sectoral policies in Europe* (London, Earthscan Publications, 2002) 5; J Bazylińska-Nagler, 'Integracja wymogów ochrony środowiska w unijnej współpracy rozwojowej' (2022) 9 *Europejski Przegląd Sądowy* 11, 12.
[17] JJ Candel and R Biesbroek, 'Toward a processual understanding of policy integration' (2016) 49(3) *Policy Sciences* 211, 213-214; and see also: C Adelle and D Russel, 'Climate Policy Integration: a Case of Déjà Vu?' (2013) 23(1) *Environmental Policy and Governance* 1, 9.
[18] I.e.: TFEU, art. 11.

> takes precedence over economic considerations, with the result that it may justify adverse economic consequences, even those which are substantial, for certain traders'.[19]

It is indicated that the integration principle may play three distinct roles in EU environmental law:

1. as an objective underlying and inspiring more specific environmental law;
2. as a rule of reference, used as a vehicle to encourage the EU and other international institutions to comply with the relevant norms of international law in their various activities;
3. as an autonomous normative principle.[20]

The status of this principle is not obvious in this case. For example, Andrzej Wasilewski acknowledges that it has the character of

> 'an absolutely binding interpretative directive which is to fulfil two functions on the basis of EU law: firstly – an integrating function, which is to ensure that environmental protection goals and tasks are taken into consideration while taking any action and in all areas of EU activities; and secondly – a compromise function, which is to oblige to avoid – as far as possible – in various areas of EU policy such regulations and activities which from the point of view of their consequences could make the realization of EU environmental goals and tasks impossible or significantly hinder them'.[21]

Owing to the reasons presented above, public planning directly corresponds with both those functions.

In environmental law scholarship this value in not only recognised but is also highly situated in the hierarchy of principles underlying the legal system. For instance, Jan Jans and Hans Vedder take the view that this is one of 'general principles of EU law' having an impact on environmental protection, alongside the subsidiarity principle and the principle of specific competences.[22] At the same time, the authors believe that this principle is also reflected in Article 37 CFREU,[23] in spite of the existing differences in the formulation of the two articles.[24] The value expressed in Article 11 TFEU is similarly classified by Ludwig Krämer. The author is of the opinion that the complete lack of even considering the environmental impact of a given EU secondary law act constitutes a breach of this Article and could lead to the voiding of such an act.[25] Whereas Jerzy Jendrośka, combining Article 37 CFREU with Article 11 TFEU, classifies this principle only as a 'general principle of environmental law'.[26] The most far-reaching assessment of obligations and consequences resulting from Article 11 TFEU is presented by Julian Nowag. According to this author,

[19] Case T-719/17 *FMC Corporation v European Commission*, ECLI:EU:T:2021:143, [2021] ECR II (not yet published), para 59.
[20] A Nollkaemper, 'Three Conceptions of the Integration Principle in International Environmental Law' in A Lenschow (ed), *Environmental policy* (2002) 25–31.
[21] A Wasilewski, 'Prawna problematyka ochrony środowiska w związku z przystąpieniem Polski do Unii Europejskiej (kwestia granic związania Państw Członkowskich prawem WE' (2004) 2 *Kwartalnik Prawa Publicznego* 183, 190.
[22] JH Jans and HHB Vedder, *European Environmental Law* (Groningen, Europa Law Publishing, 2008) 10–16.
[23] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.
[24] Jans and Vedder, *European Environmental Law* (2008) 23.
[25] L Krämer, *EC Environmental Law* (London, Thomson-Sweet and Maxwell, 2007) 23.
[26] J Jendrośka, 'Komentarz do artykułu 37' in A Wróbel (ed), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* (Warszawa, CH Beck, 2020) 984.

> 'Article 11 TFEU applies not only to the Union but also to the Member States when they apply Union law. Moreover, Article 11 TFEU is applicable to individual measures, such as decisions, directives, and regulations not only at a general policy stage'.[27]

With regard to Article 37 CFREU, Nowag takes the view that

> 'the Articles might be applied in parallel but do not affect each other's scope. Moreover, the scope of Article 37 might even be broader than that of Article 11 TFEU, as it refers to "a high level of environmental protection and improvement of the quality of the environment" rather than "environmental protection requirements". Thus, …the broader scope of Article 37 impacts on Article 11 TFEU and leads to an extension of Article 11 TFEU'.[28]

Such defined character of the environmental integration principle results in systematic 'greening' of public planning within the EU, and consequently also in the 'greening' of planning law.

III. THE LAW AS A PLAN AND THE PLAN AS AN ACT OF HARD/SOFT LAW

Law as a social instrument serves a number of functions, including innovative function, among others, i.e., the implementation of changes into the political, economic or social system in accordance with social needs in a given period.[29] At the same time, the law constitutes one of the most important instruments of social life planning in a modern state. In this context, it was indicated that

> '[a] norm maker establishing legal norms is governed by the goals defined by a given social policy and treats those norms instrumentally as a tool of social influence, as measures to achieve accepted goals. The activity of a norm maker aims at a conscious and planned development of social relations and creation of such norms of conduct which not only reflect current social relations but also initiate new patterns of conduct becoming a factor of social transformations'.[30]

A similar thesis is presented by Scott Shapiro, who attempts to determine the nature of law through the prism of the logic of planning theory. As a result, the author, within his 'planning theory of law', takes the view that

> 'legal activity (i.e., the exercise of legal power) is the activity of social planning. Legal institutions plan for the communities over whom they claim authority, both in the sense of telling their members what they may or may not do, as well as authorizing some of these members to plan for others… Legal rules of a particular system, then, are just the general plans, or plan-like norms, that are formulated, adopted, affected, applied and enforced by legal officials of that system for members of a certain community'.[31]

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[27] J Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford, Oxford University Press, 2016) 48.
[28] ibid at 19.
[29] S Wronkowska and Z Ziembiński, *Zarys teorii prawa* (Poznań, Ars Boni et Aequi, 1997) 233–239.
[30] M Borucka-Arctowa, *Świadomość prawna a planowe zmiany społeczne* (Wrocław, Ossolineum, 1981) 69.
[31] SJ Shapiro, 'The Planning Theory of Law' (2017) 600 *Yale Law School, Public Law Research Paper* 1, 2–3, http://dx.doi.org/10.2139/ssrn.2937990.

Researching the nature of law by comparing it to a general model of social life regulation by means of planning, the author notices that legal activity seeks

> 'to accomplish the same basic goals that ordinary, garden-variety planning does, namely, to guide, organize and monitor the behaviour of individuals and groups. It does this by helping agents lower their deliberation, negotiation and bargaining costs, increase predictability of behaviour, compensate for ignorance and bad character and provide methods of accountability'.[32]

Shapiro stresses that an activity such as the law-making process is of gradual character. According to him 'planners usually begin with partial plans and fill in the details over time. Law follows the same route'.[33] At the same time, the author also sees two directions that the process of planning through the legal system might take. As a result, he classifies legislation as top-bottom planning, and customary law as bottom-up planning.

The theoretical discussion concerning the issue of 'the law as a plan' mentioned above is undoubtedly inspiring and should be viewed as an important research area. It illustrates, in an interesting way, challenges related to the establishment of relations between the theory of planning and the theory of law. Its general conclusions surely correspond with the question about the role of planning act in the transformation of socio-economic life towards sustainable development. Thus, these challenges may be useful for the purpose of understanding the full impact of dynamically changing circumstances conditioned by the requirements of efficient environmental protection on the theory of law. Potentially, they might contribute to overcoming current limitations in the perception of this phenomenon existing on the side of this group of lawyers who are attached to the formalism attributed to autonomous law. Nevertheless, it should be acknowledged that currently, in order to assess if a given legal system is 'sustainable', the status of the plan as an act of hard or soft law[34] is of key significance.

Sustainable development and the 'integrated approach' emphasise the role of a plan in the transformation of socio-economic life, which inevitably has to result in the intensification of the discussion on the status of the planning act (being a formal effect of public planning) as a source of law. This discussion fits into a broader context, which is the reflection on the nature of a legal system, led through the prism of Nonet and Selznick's concept of autonomous and responsive law. The proliferation of planning acts in EU law provides a growing number of arguments confirming the aspiration to break the formalism attributed to autonomous law that adheres to procedural fairness rather than substantive justice, and is focused on formalism and legalism rather than on setting new ambitious goals in order to reshape socio-economic life in a planned manner. Such a shift is visible in the activities of both EU institutions (adopting soft law acts) and the EU legislator (enacting binding acts of secondary law).

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[32] ibid at 8.

[33] ibid at 4.

[34] F Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations' (1995) 4 EUI Working Papers LAW 1, 1–2; according to this author:

> 'the legal system of the European Union embraces numerous types of norms. Some of these norms are legally binding, while others have legal effects of a different kind or are without legal force. This second group of norms comprises rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects. It thus constitutes EU soft law'.

EU policy and the law-making process governed by the environmental integration principle and resulting in planning acts having the form of legally binding secondary law acts or soft law acts, offer a field to formulate initial conclusions regarding the level of 'greening' of EU legal system in this scope. The analysis conducted with the help of legal 'reverse engineering' reveals the following two key models of planning acts functioning in EU law:

1. 'basic', still used most frequently and embracing the following levels of activity:
   i. the coordination of political goals at an initial level;
   ii. the summary of the results of the coordination in a soft law act (often in the form of a communication of the European Commission, e.g., EU Biodiversity Strategy for 2030 and A New Circular Economy Action Plan);[35]
   iii. the implementation of an adopted soft law act by means of more detailed planning acts and/or other methods, including the revision of current legal measures resulting from hard law acts;
2. 'enhanced', i.e. embracing the following levels of activity:
   i. the coordination of political goals at an initial level;
   ii. the summary of the results of coordination in a hard law act (EU regulation,[36] directive[37] or decision[38] not specifying the addressees);[39]
   iii. the implementation of an adopted hard law act by means of more specific legal and non-legal measures.

The 'basic' model corresponds with the views of those law theoreticians and practitioners who prefer a traditional approach to the theory of sources of law, and who in principle pertain sceptically to the postulate of direct integration (or 'coordination') of public planning with legislative activity sensu stricto. Whereas, the 'enhanced' model embodies the reaction to challenges related to the effectiveness of public planning in sustainable development transformation, which also includes the problem of the legal form of planning acts.

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[35] European Commission, Communications: *EU Biodiversity Strategy for 2030 'Bringing nature back into our lives'*, COM/2020/380 final; *A new Circular Economy Action Plan 'For a cleaner and more competitive Europe'*, COM/2020/98 final, eur-lex.europa.eu; but also see, for instance: The Resolution of the Council and the Representatives of the Governments of the Member States: *A European Community programme of policy and action in relation to the environment and sustainable development (the 5th EAP)* [1993] OJ C 138/1(5).

[36] See, e.g.: 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') [2021] OJ L 243/1; proposal for a Regulation of the European Parliament and of the Council on nature restoration, Brussels, 22.6.2022 COM(2022) 304 final, art. 1(2):

> 'This Regulation establishes a framework within which Member States shall put in place, without delay, effective and area-based restoration measures which together shall cover, by 2030, at least 20% of the Union's land and sea areas and, by 2050, all ecosystems in need of restoration.'

[37] See, e.g.: Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L 164/19.

[38] Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme [2002] OJ L 242/1; Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L 354/171; 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 [2022] OJ L 114/22.

[39] TFEU, art. 288; see also: M Baran, 'Decyzja' in S Biernat (ed), *Podstawy i źródła prawa Unii Europejskiej* (Warszawa, CH Beck, 2020) 1068–69 .

IV. THE LEGAL FORM OF EU PLANNING ACTS AND THE EGD

There are several reasons behind the tendency, seen in recent years, to give a planning act the form of hard law act by the EU legislator, of which two key ones may be identified. It appears that, firstly, it aims to assume more significance to public planning conducted at the EU level. The continuously growing involvement of the European Union in the sustainable development process unequivocally connects with outlining highly ambitious objectives by and for itself in that regard. In accordance with the unquestionable logic of transformation, these objectives must be coordinated with all of the EU's policies and activities. At the initial level of the EU policy and law-making process, the result of such a deep involvement of the EU is reflected in an intense substantive work, subsequently summarised in a programme, plan, strategy or a policy framework.[40] The ambitions concerning the achievement of a desirable change in a given moment in the future mirrored in that work, however, often collide with the harsh reality of law compliance. The differences between the enforcement of a soft law act and a hard law act are evident. Thus, the change of the form of a planning act into a legally binding act is, at least in the assumption of the EU legislator, to positively affect the level of its effective enforcement.

Whereas the other key issue is the democratic legitimacy of EU soft law acts.[41] Taking into consideration the role of public planning for sustainable development in the light of the principle of environmental integration, it can be easily noted that the result of the 'integrated approach' – i.e., the planning act – poses inherent and serious risks of adverse impact on the rights and freedoms of individuals. Admittedly, a soft law act is nominally not legally binding,[42] but in the case of planning within sustainable transformation, such an act in the substantive context frequently produces general and external effects on the legal status of different groups of addressees.[43] Therefore, a planning act in the form of a soft law act may raise objections in the light of general requirements resulting from the rule of law,[44] such as, *inter alia*: the accountability of all persons, public and private, to laws that are publicly promulgated; the principle of supremacy of law; legal certainty; procedural and legal transparency; and public participation in decision-making.[45] Moreover, the ongoing debate on that fundamental value has already been readdressed, hence the emergence of the concept of the 'environmental rule of law'.[46] This is based on a primary assumption that 'environmental

[40] i.e., a document setting out procedures or goals outlining the institution's position or approach to a given issue.

[41] D Petropoulou Ionescu and M Eliantonio, 'Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective' (2021) 17(1) *Journal of Contemporary European Research* 43, 49.

[42] Expressing her critical view about the EU Courts' formalistic understanding of the notion of legally binding effects in regard to EU soft law and Article 263 TFEU, Giulia Gentile rightly observes that 'by excluding direct judicial review of EU soft law, this jurisprudence creates a gap in the EU judicial protection system in relation to such acts'; G Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach' (2020) 16 (3) *European Constitutional Law Review* 466, 483.

[43] O Ștefan, 'Soft Law and the Enforcement of EU Law' in A Jakab and D Kochenov (eds), *The enforcement of EU law and values: ensuring member states' compliance* (Oxford, Oxford University Press, 2017) 215–217.

[44] See, e.g.: European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI) [2007] OJ C 187E/75; point X:

> 'where the Community has legislative competence but there seems to be a lack of political will to introduce legislation, the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality under Article 5 of the EC Treaty, and may result in the Commission's acting ultra vires'.

[45] UN (2004), Report of the Secretary-General: *The rule of law and transitional justice in conflict and post-conflict societies*, Security Council, United Nations S/2004/616, 4.

[46] See, e.g.: UNEP, *Environmental Rule of Law: First Global Report*, Nairobi 2019.

sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and rule of law'.[47] The obvious conclusion from this circumstance is that public planning for sustainable transformation must equally comply with this value. This is an essential premise which the EU legislator must also take into consideration while choosing the legal form of planning acts.

Yet, in the light of the above, a certain paradox may be observed. In principle, sustainable development results in the 'greening' of the legal system, i.e., its systematic transformation in accordance with the pattern characteristic for responsive law. However, in regard to the legal form of planning acts, this trend is disrupted in a specific way, due to the fact that the rule of law requires that the planners not only possess the necessary legitimisation to plan. Similarly important is the duty to implement the result of public planning – a planning act – into a given political and legal system in accordance with that value, beginning with the fulfilment of the procedural and legal transparency requirement. In this manner the less formalised 'basic' model of planning acts functioning in EU law is beginning to be displaced by the 'enhanced' model involving the classic and formal legislative procedure. The observation of public planning practices at EU level confirms that, in order to meet the standard determined by the rule of law, the EU legislator chooses the form of legally binding secondary law act for a steadily growing number of EU planning acts.

Taking under consideration both presented models in section III, the attempt to assess the EGD encounters a difficulty. There is no doubt that, in its assumption, the EGD, as an unique 'metaplan', maximally embodies the integration principle presented in Article 11 TFEU. It is explicitly defined as

> 'a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use'.[48]

Thanks to this, the legal form of the EGD solely as a communique from the Commission should be acknowledged as highly unrepresentative, taking into consideration its true significance and the scope of multidimensional impact on various groups of addressees. The holistic and comprehensive perception of the relation between humans and the environment adopted in the EGD means that, as a 'metaplan', it goes beyond the abovementioned dichotomous division, as far as the model of functioning of planning acts in the system of EU law is concerned. The observation of the activity of the European Commission in the years of 2020-2022 indicates that the EGD's goals in various sectors were transferred to 'sectoral' planning acts, which were then adopted by using both models.

Despite a relatively short period of time since the introduction of the EGD, a new trend may already be noticed, within the scope of intensified efforts of the Commission, whose aim is to accelerate the EU transformation toward sustainable development. Planning acts implementing the EGD presented in 2020 were still in the form of soft law acts (e.g., the 2020 New Industrial Strategy

[47] UNEP 2012, Advancing Justice, Governance and Law for Environmental Sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General, https://wedocs.unep.org/20.500.11822/9969
[48] EGD (n 3) at 2.

for Europe[49] or the EU Farm to Fork Strategy).[50] However, in regard to a fundamental planning act such as the 'European Climate Law', in 2021 the Commission decided to employ the 'enhanced' model for the purpose of public planning of this area. Consequently, the EU legislator enacted Regulation 2021/1119.[51] The same model was proposed in the case of another ambitious planning act, which is the 'Nature Restoration Law', i.e., a proposal for the new EU regulation in June 2022. Both instances constitute good examples of how the European Commission gradually changes the manner of executing its monopoly on the EU legislative initiative when public planning for sustainable development comes into play. Noticeably, the Commission attempts to increase the chances of effective compliance and enforcement of planning acts integrating the important environmental goals of the EGD into the EU's legal framework, while simultaneously expressing greater sensitivity to the issue of the legal form of planning acts in the light of the rule of law.

V. CONCLUSIONS

The dynamic transformation of socio-economic life towards sustainable development leads to a situation in which the system of law cannot remain indifferent to the changes resulting from it. The scale of changes, which the law faces as a social instrument, is unerringly reflected in the environmental integration principle. In the light of this value, a planning act being a result of public planning becomes a basic and foreground form of conduct, by means of which the transmission of political goals oriented toward such a defined change into the legal system takes place. Specific legal measures, which are to directly serve the achievement of these goals, are currently shaped only at a later stage of the legislator's activity within a given legal system and in a way that is unequivocally correlated with a particular planning act. Currently, the process is very well illustrated at EU level by the EGD along with secondary 'sectoral' planning acts, which determine the direction and pace of transformation of the European Union as a whole.

Such understood 'greening' of the legal system in accordance with the environmental integration principle results in the fact that the legislator increasingly acts in a way that is more characteristic for responsive law rather than autonomous law. In this respect, the successive implementation of the integration principle undoubtedly contributes to the intensification of this effect. The question regarding the legal form of a planning act in the light of the theory of sources of law is a typical example, clearly proving growing difficulties in the description of reality by means of traditionally defined legal constructions and doctrines. Against this background it can be seen that the environmental integration principle and planning act expressing it (as a result of public planning) enforce a new debate of fundamental political and legal issues.

The main goal of this discussion is to find the right model of functioning of a planning act in a 'sustainable' legal system. On the one hand, the model should emphasise the rank and significance of public planning and its results in a more rational, unequivocal and open-minded way than it has been done so far in the system of law. On the other hand, the incorporation of a planning act into the logic of the legal framework within this model should correspond adequately to the superior value, which is the rule of law. In view of the findings made, it should be assumed that this system-wide value takes precedence over the environmental integration principle. In consequence, the rule of law

[49] European Commission, Communication: *A New Industrial Strategy for Europe*, COM(2020)102 final, eur-lex.europa.eu
[50] European Commission, Communication: *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system*, COM(2020)381 final, eur-lex.europa.eu
[51] Above n 36.

limits the prospect of deformalising public planning for sustainable development in a way corresponding with the responsive law paradigm. But, interestingly, at the EU level, the process of implementation of the EGD offers an important opportunity to test new ideas and regulating approaches, motivated by the abovementioned reasons, by the EU legislator trying to face such complex challenges.

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