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THE EU BIODIVERSITY STRATEGY FOR 2030: BUILDING NATURE RESILIENCE IN THE WAKE OF THE POST PANDEMIC COVID-19 SOCIO- ECONOMIC RECOVERY

Abstract

Scientists strongly emphasize that the nature protection will be crucial in the wake of the post pandemic COVID-19 socio-economic recovery as the jump-start of the economy of so-called “new normality” should not result in further environmental degradation¹.

The paper discusses the European Union Biodiversity Strategy for 2030 (hereinafter referred to as BS) whose adoption has been announced in the European Green Deal document (hereinafter referred to as EGD) as, *inter alia*, the basis for building biodiversity resilience. As a comprehensive strategy aiming to foster the transition of the European Union into a green and digital economy, the EGD has included among its main objectives preservation of ecosystems and biodiversity.

¹ Read more: Intergovernmental Science-Policy Platform for Biodiversity and Ecosystem Services (IPBES) (2020), Workshop Report on Biodiversity and Pandemics of the Intergovernmental Platform on Biodiversity and Ecosystem Services, https://ipbes.net/sites/default/files/2020-12/IPBES%20Workshop%20on%20Biodiversity%20and%20Pandemics%20Report_0.pdf (accessed 29.08.2022); Intergovernmental Platform for Biodiversity and Ecosystem Services (2019), Summary for Policymakers of the IPBES Global Assessment Report on Biodiversity and Ecosystem Services, https://ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf (accessed 29.08.2022).

Special emphasis is put on the BS which has been adopted in the middle of the pandemic COVID-19 and which aims, *inter alia*, to enhance environment resilience. The EU ambition is to ensure that the world ecosystems are restored, resilient, and adequately protected by 2050. From this perspective, the EU biodiversity strategy is focused on strengthening nature protection. One of its purposes is to create political and legal tools for building environment resilience, particularly desirable in time of the “new” socio-environmental normality, following the pandemic crisis.

The paper comprises three parts: The introductory issues are followed by the legalsystemic approach to EGD, BS, and the 8th General Union Environment Action Programme until 2030 (hereinafter referred to as the 8th EAP). The third part addresses biodiversity building resilience from the EGD, BS and the 8th EAP. At the end some complementary remarks *de lege lata* and *de lege ferenda* are offered.

KEYWORDS

European Green Deal, Biodiversity Strategy for 2030, building environmental resilience, the 8th General Union Environment Action Programme for 2030, green oath, COVID-19 context, EU biodiversity protection legally binding law

SŁOWA KLUCZOWE

Europejski Zielony Ład, Strategia na rzecz Bioróżnorodności 2030, budowanie odporności środowiska, ósmy Ogólny Program Działania na rzecz środowiska, „zielone przyrzeczenie”, COVID-19, akty prawnie wiążące UE dotyczące bioróżnorodności

1. INTRODUCTORY ISSUES

For many years, environmentalists have warned that biodiversity losses and degradation of ecosystems will be the two most important threats to mankind in the next decade². For many years, too, in its strategies and action programmes the European Union has stressed that in addition to the climate crisis we are also threatened by the biodiversity crisis, that these two elements are interrelated and essentially determine the quality of the environment in which we live. It is almost every day that we learn of the rate at which the wild animal population shrinks, the wild forests and wetlands decline and the fauna and flora species, which play

² See e.g. materials of the World Economic Forum 2020, The Global Risks Report 2020.

a key role in mitigating climate change rate, disappear³. The consequence of these developments is a dramatically quick degradation of ecosystems.

The European Union biodiversity protection policy attempts to solve the problems related to environmental degradation by undertaking restoration of ecosystems and biodiversity. At the EU level, nature and biodiversity are protected by several laws of different legal character. Having in mind the general division of legal norms into two categories – those of soft and hard law or legally binding and non-binding law – one may start with the EU primary law, i.e. the principles of the EU treaties as a basis for legislation in the field of nature protection. The next level of legally binding norms in the general hierarchy of the EU laws are international treaties. They rank between primary and secondary law. In accordance with the provisions of Arts. 191 and 193 TFUE, the EU adhered to a number of international conventions that had adopted as their general objective the protection of nature or its parts⁴, among them, to the 1992 Convention on Biological Diversity⁵. An international convention to which the EU adheres becomes part of the EU binding law (Art. 216 (2) TFUE), at least where the area covered by the convention belongs to the EU competencies. It is worth mentioning that for the majority of these conventions, the EU did not adopt any implementing measures of secondary law.

As far as the EU secondary hard law is concerned⁶, the EU has been committed to the protection of nature since adoption of the so-called Birds Directive on the conservation of wild birds in 1979 (Dir. 2009/147/EC – a codified version of Dir. 79/409/EC). On 28 March 1983, the EU adopted the Seal Pups Directive concerning the importation into Member States skins of certain seal pups and products derived therefrom (Dir. 83/129/EEC). In 1992, the EU adopted the so-called Habitats Directive (92/43/EEC) on the conservation of natural habitats and wild fauna and flora (consolidated version of 2007). Another legally binding instrument on nature conservation is the Regulation of 4 November 1991 which prohibits both the use of leghold traps in the community, and introducing into the community pelts and other products manufactured from certain wild animal species originating from the countries where they are caught by means of leghold traps or trapping methods which do not meet international humane trapping standards (Reg. (EEC) 3254/91). In March 1999, the Directive on keeping wild animals in zoos (Dir. 1999/22/EC) has been adopted. In 2009, the EU adopted

³ The threats related to this also pose a risk to food systems at a global scale. In this context, it is important to note the fact that half of the gross global product depends on nature. See the Commission information, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green/actions-being-taken-eu/eu-biodiversity-strategy-2030_pl (accessed 25.11.2020).

⁴ See M.M. Kenig-Witkowska, *Prawo środowiska Unii Europejskiej. Zagadnienia systemowe* [European Union environmental law: Systemic issues], Warszawa 2011, Chapter IV.

⁵ Dec. 93/626 [1993] OJ L 309/1.

⁶ European Commission, Nature and biodiversity law, https://ec.europa.eu/nature/legislation/index_en (accessed 30.07.2022).

the Regulation on trade in seal products (Reg. (EC) 1007/2009, and in 2014 the Regulation on the prevention and management of the introduction and spread of invasive alien species (EU Reg. 1143/2014).

The European Union adopted a number of soft law documents on biodiversity protection, mainly the Communications on the EU strategies for biological diversity. Their main objectives include protection, conservation, and enhancement of the EU's natural capital, as well as protection of citizen's health and well-being against risks and impacts related to the worsening state of the environment⁷. In the form of a Communication the EU has adopted the European Green Deal and the Biodiversity Strategy for 2030⁸. From the post-COVID-19 pandemic perspective, the EGD and the BS, which is an integral part of the broadly conceived EU sustainable development strategy, provide for systemic mechanisms designed to address the problems related to environmental degradation, having in mind the need to transform the EU into a modern society, fully respecting the requirements of environmental protection, including the protection of biodiversity.

When taking up the issue of environmental resilience, first of all it should be noted that the issue is multidimensional. The term, which is also used in the broad context of building resilience, applies both to the environment in its general meaning, i.e. something that surrounds us, and to its particular components, including the social environment⁹. It is generally believed that environmental resilience should be understood in terms of the time needed for a system to restore its state of equilibrium or the state before the equilibrium was disturbed¹⁰. When conceived more broadly, this is an approach to the issue of durability of systems from the perspective of their ability to cope with changes and disturbances. The resilience of an ecosystem characterises its stability, defined as the durability of a system under the conditions of an unchanged environment and its capacity to restore its original state after the disturbing external factors cease their impact. Thus, building resilience of an ecosystem is based on measures intended to sustain the health and function of habitats, organisms, and processes unfolding in an ecosystem. The elements which characterise ecosystems are very important from the point of view of legal regulations since they relate to the standards to which the strategies and methods for counteracting adverse changes in the environment refer. From this perspective, one can say that the resilience paradigm raises sig-

⁷ L. Krämer, *EU environmental law*, 8th ed., London 2016, Section 5.

⁸ 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, <https://eur-lex.europa.eu> (accessed 31.08.2022).

⁹ See e.g., J. Ebbeson, *The rule of law in governance of complex socio-ecological changes*, "Global Environmental Change" 2010, Vol. 20, issue 3.

¹⁰ See e.g., *Rola odporności środowiska w planowaniu przestrzennym* [The role of the environmental resilience in spatial planning], "Problemy Ekologii Krajobrazu. Wybrane zagadnienia z problematyki gospodarowania przestrzenią", Vol. XXXVII, p. 8.

nificant challenges to environmental law, especially in time of the COVID-19 pandemic crisis and so-called “new normality”¹¹.

¹¹ The concept of environmental resilience, as one of the elements of the ecosystem approach to environmental protection, can be found in legal acts of soft law, such as the 1972 Stockholm Declaration and the 1992 Rio Declaration, in many multilateral international agreements on biodiversity, and in the case law of international courts. As the concept of environmental resilience became saturated with a normative content, the principle of resilience reached a status which made it eligible for codification, as provided for, *inter alia*, by the Draft Global Pact for the Environment, which codifies the general principles of environmental law, *inter alia*, on the basis of state practice. From the perspective of an evaluation of the legal construction of the principle of resilience as the general principle of environmental law, it can be said that it is based on the common belief of the international community that there is an obligation to sustain the ecological processes and life processes on the Earth. This principle is deeply rooted in the idea of the obligation to preserve the natural resources of the Earth for the benefit of the future and present generations, along with the idea that the natural resources of the Earth must be safeguarded for the benefit of the future and present generations, and in the idea that the capacity of the Earth to produce vital renewable resources must be maintained, restored or improved (the Stockholm Declaration, Principles 2 and 3, and the provisions of the 1982 World Charter for Nature). In accordance with its standards, environmental policy and law must aim not only to remedy damage done to the environment but also to strengthen the capacity of ecosystems to restore their properties and their natural equilibrium. Resilience is a component of each ecosystem approach to biodiversity protection which should be expressed in newly adopted or amended provisions of international agreements on biodiversity. Such an approach is present, *inter alia*, in the environmental impact assessment procedures (the 1991 Espoo Convention) and in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). In light of this, the above-mentioned demands for new or possibly amended international agreements require the use of up-to-date data on the state of the environment and, therefore, require the application of an approach consistent with the principle of resilience. For further reading: R.L. Fishman, *Letting go of stability: Resilience and environmental law*, “Indiana Law Journal” 2019, Vol. 94, issue 2, Art. 8, pp. 690–728; W. Wagner, R. Anhold, *Resilience as the global strategy’s new leitmotif: Pragmatic, problematic or promising?*, “Contemporary Security Policy” 2016, Vol. 37, No 3, pp. 414–430; A. Garmestani *et al.*, *Untapped capacity for resilience in environmental law*, “Proceedings of the National Academy of Sciences” 2019, Vol. 116, issue 40, www.pnas.org/cgi/doi/10.1073/pnas.1906247116 (accessed 30.07.2022); C.S. Hollings, *Resilience and stability of ecological systems*, “Annual Review of Ecological Systems” 1973, Vol. 4, pp. 1–23; B. Walker, D. Salt, *Resilience thinking: Sustaining ecosystems and people in a changing world*, Washington 2006; J.B. Ruhl, *General design principles for resilience and adaptive capacity in legal systems – with applications to climate change adaptation*, “North Carolina Law Review” 2011, Vol. 89, issue 5, pp. 1373–1403; A.S. Garmestani, C.R. Allen, M. H. Benson, *Can law foster social-economical resilience?*, “Ecology and Society” 2013, Vol. 18, issue 2, <https://www.ecologyandsociety.org/vol18/iss2/art37> (accessed 30.07.2022); J. Ebersson, E. Hey, *Introduction: Where in law is social-ecological resilience?*, “Ecology and Society” 2013, Vol. 18, issue 3; A. Richling, J. Solon, *Ekologia krajobrazu [The Ecology of the Landscape]*, Warszawa 2011; Building Resilience: WWF recommendations for a just & sustainable recovery after COVID-19. Using the Green Deal to drive Europe’s recovery and transition to a fair, resource-efficient and resilient society, WWF European Policy Office 1 April 2020; M. Simoncini, A. Lazari, *Principles and policies of resilience in European critical infrastructures: Cases from the sectors of gas and air transport*, “Legal Issues of Economic Integration” 2016, Vol. 43, issue 1, pp. 41–63.

The legal standards consistent with the principle of resilience refer to the natural regeneration capacity of ecosystems. As a principle of environmental law, it provides for a precautionary approach which imposes the obligation to consider the possible occurrence of factors disturbing the natural state of ecosystems. The formula adopted in the principle of resilience results from consideration of both the practice and the views of the doctrine of environmental law on this matter (e.g. the draft of the Global Pact for the Environment). It follows from the formula that States should take any appropriate and necessary measures to maintain and restore the diversity of ecosystems and the capacity of ecosystems and human communities to mitigate disturbances and degradation of the environment. In the current state of international practice, it is quite difficult to formulate the legal character of this principle. It follows from a review of the literature that this principle has had to date the character of a policy guideline with quite a limited level of normativity. For this reason, its standards should be formulated in the context of the application of other principles of environmental protection. It seems that the practical application of the principle of resilience requires an active approach to its implementation, which involves, *inter alia*, the determination of the level of dynamism in the process of building and strengthening the resilience of ecosystems rather than relying only on their natural restoration capacity. It follows, *inter alia*, from experience gained in actions accompanying attempts to combat climate change, demonstrating that in any circumstances a given environmental context of the restoration of ecosystems is of essential importance.

2. EUROPEAN GREEN DEAL, BIODIVERSITY STRATEGY FOR 2030, AND THE 8TH GENERAL UNION ENVIRONMENT ACTION PROGRAMME FROM THE LEGAL-SYSTEMIC PERSPECTIVE

The three above mentioned legal instruments define rather complicated legal character of the Strategy. In December 2019, the European Commission presented its Communication on the EGD for the European Union and its citizens. It obliges the EU to successfully tackle the challenges related to climate change and the natural environment. In operating terms for the EGD, it is most important to strengthen in the EU's actions the conjunction between broadly conceived environmental protection and the process of the economic transition in the EU, with emphasis put on the economic growth based on sustainable development of the EU, so as to achieve zero greenhouse gas emissions in 2050. In many places, the EGD Communication from the Commission refers to the restoration of ecosystems and biodiversity; still, Section 2.1.7 of that document is of essential importance as it is devoted as a whole to these issues. *Inter alia*, it refers to the BS prepared for this purpose by the European Union and published in the form of a Communication

from the Commission in May 2020¹². In this context, it is important to refer, too, to the 8th General Union Environment Action Programme until 2030 (hereinafter 8th EAP), the adoption of which was announced in the EGD. It confirmed the environmental and climate-related objectives of the EGD and adopted as one of its priority objectives protecting, preserving and restoring marine and terrestrial biodiversity and the biodiversity of inland waters inside and outside protected areas, by, *inter alia*, halting and reversing biodiversity loss and improve the state of ecosystems and their functions as well as the services they provide, and by improving the state of air, water and soil (Art. 2 of the Decision of the 8th EAP)¹³.

One of the basic questions which arise at this point of the considerations concerns the legal character of the above mentioned instruments of the European Union law. Both the EGD and the BS have been published in the form of Communications from the Commission. The Communications which the Commission addresses to the other EU Institutions usually explain the positions of the Commission on specific issues or problems. Also, they often present options for the solution to a certain problem and the arguments for the proposed solutions; at times, they precede legislative proposals of the Commission. It should be borne in mind, however, that while the Communications present the positions and views of the Commission on a given issue, they have not the force of legally binding acts and that, in legal terms, they have the value of *de lege ferenda* policy guidelines. It should also be noted that the Communications are not listed as EU law instruments in the provisions of Chapter 2, Title I, Part 6 of TFEU which concern the legal acts of the EU and the procedures for their adoption.

The situation is different in the case of the determination of the legal character of the general EU actions programmes, provided for in Art. 192(3) TFEU, which are characterised in terms of the evaluation of their binding force by a special legal construction. The general actions programmes setting out priority objectives to be attained are adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure and after consultations with the European Economic and Social Committee and the Committee of the Regions in the form of a decision adopting the action programme¹⁴. Since the ordinary legislative procedure is applied to adopt the EAPs, in legal terms they are binding for the EU Institutions. But, as the second sentence of that provision stipulates, the measures necessary for the implementation of these programmes,

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Biodiversity Strategy for 2030. Bringing nature back into our lives, Brussels, 20.5.2020, COM (2020) 380 final.

¹³ Decision (EU) 2022/591 of the European Parliament and the Council of 6 April 2022, on a General Union Environment Action Programme to 2030, OJ. EU L114/22. Art. 1(2) of the Decision endorses the environmental and climate objectives of the European Green Deal and its initiatives.

¹⁴ *Ibidem*, Art. 1; see also the Decision of the European Parliament and the Council, on a General Union Environment Action Programme to 2020, OJ. EU. L. 2013. 354.171, Art. 1.

i.e. implementing the priority objectives set out in the EAPs, are adopted under the terms of paras 1 or 2 of Art. 192 TFEU and usually have the form of Directives or Regulations. As a legally binding instrument for the EU Institutions, an EAP provides the basis for the adoption of more legislative and non-legislative acts on a given matter.

As all the legal measures which are not listed in the catalogue of EU legal instruments in Art. 288 TFEU, the EAPs essentially represent the policy stage in the process of adopting legally binding decisions, which are then specified in legal norms. The EAPs are legally binding for the EU Institutions, but they may not give rise to direct legal obligations for Member States or for individuals, unless under paras 1 and 2 of Art. 192 TFEU the measures necessary for the implementation of the objectives of a given programme are adopted¹⁵. The EU Institutions have legally binding obligations arising from the content of the programme, as regards both the obligation to take implementing measures and their contents in relation to the objectives set out in the programme. The operating practice of successive environment action programmes indicates that the EU Institutions are aware of the legally binding character of these programmes and the associated need to take implementing measures. It should be noted that in the practice of the European Union no procedure has been implemented to date to control the legality of legislative acts on this matter, with reference to Arts. 263 or 265 TFEU, and that the objectives laid down in the EU environment action programmes have not been attained or these programmes have been implemented incorrectly¹⁶. It should also be noted that following the amendments made in the Treaty of Lisbon the legally binding character of the action programmes gained in importance at both EU and Member States' levels¹⁷.

Bearing in mind the fact that the EAPs have effectively operated for more than 40 years in the legal system of the European Union, it is justified to consider the legal character of the principles concerning the environment as laid down in those programmes. It follows from a review of the EAPs, including the 8th EAP,

¹⁵ See e.g. A. Epiney, *EU environmental law: Sources, instruments, enforcement*, "Maastricht Journal for European and Comparative Law" 2013, Vol. 20, issue 3, pp. 403–422. As legal acts, they appeared in the 1970s when the then Community began to introduce measures in the field of the environment and there was no treaty basis for such measures. In legal terms, the action programmes were a sort of Communications from the Commission which defined the objectives and tasks of the organisation for a specific period of time – four or five years. Those programmes continued to be adopted by way of a Resolution of the European Parliament and of the Council. In the TFEU, the action programmes are listed as legal acts in the field of the environment in Art. 192(3). This provision stipulates that general action programmes are adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. It should be borne in mind that in the case of general action programmes the Commission has the right of legislative initiative.

¹⁶ *Ibidem*, p. 404.

¹⁷ On this issue, see M. Kenig-Witkowska, *Prawo środowiska...*

that they mainly refer to general, horizontal EU treaty-based principles which apply to the legal regulations in the field of the environment, such as e.g. the principles of subsidiarity and proportionality (Art. 5 TEU) and the integration clause (Art. 11 TFEU), as well as, to the principles of EU policy on the environment as laid down in Art. 191 TFEU. In contrast, the EGD documents do not explicitly refer either to the general horizontal treaty-based principles applicable to the field of environment or to the principles of EU policy in that field, and the BS does not either. However, under the assumption that the principles laid down in Art. 191 TFEU are the principles of EU policy on the environment, it should be taken that by definition they have been considered in the process of preparing and adopting all the documents concerning the EGD, the BS, and the 8th EAP.

In relation to the above comments on the principles of EU policy and law in the field of the environment, it should be noted that the principle/idea/concept of “a green oath: do no harm” has been introduced into EU policy law in the field of the environment. The EGD (section 2.2.5) refers it to the policy of better regulation and tools to support sustainable development and innovation. The aim of “a green oath: do no harm” is to ensure that all the initiatives under the EGD achieve their objectives in the most effective and least burdensome way and all other EU initiatives are implemented in accordance with “a green oath: do no harm”. To this end, the explanatory memorandum accompanying all legislative proposals and delegated acts will include a specific section explaining how each initiative upholds this principle (in Section 2.2.5 of the Communication used the term “principle”; and so did the European Council in p.14 of the Presidency Conclusions)¹⁸. The Decision adopting the 8th EAP provides that all initiatives under Next Generation EU Recovery Plan should respect the EGD’s “do not significant harm” oath (recital 7 of the preamble). In its Part 1, entitled “Biodiversity – the need for urgent action”, the BS largely repeats the construction of the “do no harm” concept as laid down in the documents cited earlier. It follows from the provisions on this matter that the oath to do no harm primarily applies to the EU law-making stage and will accompany all the EU legislative initiatives, including all legislative proposals and delegated acts. Therefore, it might be said that in this way another principle of EU policy in the field of the environment has been introduced into the EU legal order, i.e. a green oath: do no significant harm.

In the determination of the standards for the so-called green oath, consideration should be given to both objectives and principles involved in the establishment and implementation of EU policy on the environment. In this context and in relation to the standards for a green oath, there is still the need to define the concept of “harm” which is very extensive semantically and undoubtedly refers to the well-known customary principle of environmental law, i.e. the prevention

¹⁸ <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusion.pdf> (accessed 31.08.2022).

of environmental damage¹⁹, containing in itself the *designata* of the concepts of “prevent”, “conserve”, and “protect”. It seems that from this perspective the concept of “do no harm” will be defined *ad causum* in the EU law practice, especially in the future case law of the Court of Justice of the European Union since the concept of harm in EU policy and law is often viewed as a concept, where economic value is located on the lost and damaged object and qualified in a vague category of “significant”. For example, the provision of Art. 2 of the Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage defines environmental damage using the legal category of significant adverse effect, significant risk, which is difficult to measure²⁰. Those categories involve a very important question of the threshold of significant harm, especially in the case of possible irreversibility of the harm.

The oath “do not harm” contained in the EGD documents, will concern the future law-making process. At present, it would be hard to predict whether the inclusion of the concept of the green oath into the EGD documents as a principle of EU policy in the field of the environment will provide a supplementary item in the catalogue of measures enhancing the effectiveness of legal acts adopted in this field. It seems *prima facie* that its standards are quite clearly related to the principles of EU policy which already apply in the field of the environment. The inclusion of the green oath into the documents mentioned above, first of all, gives the impression of a technical measure, recalling the principle of preventing environmental damage as applied in international law. As regards its operating aspect, it seems that at the present stage of legal considerations on “the green oath” certain guidance on this matter is provided by the EU taxonomy system and the Technical guidance on the application of “do not significant harm”, to assist national authorities on the preparation of their plans under the Recovery and Resilience Facility Regulation²¹. Art. 17 of the 2020/852 Regulation defines the meanings of “significant harm” for the six environmental objectives of the Regulation. As for biodiversity and ecosystems, an activity is considered to do significant harm to their protection and restoration, if it is significantly detrimental to the good condition and resilience of ecosystems, or detrimental to conservation status of habitats and species, including those of the EU interest. Despite this explanation, still the

¹⁹ A. Kiss, D. Shelton, *Guide to international environmental law*, Leiden, Boston 2007, p. 90 *et seqq.*

²⁰ OJ. EU. L. 2004. 143/56.

²¹ Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a framework to facilitate sustainable investment, and amending Regulation 2019/2088; Regulation on the recovery and resilience facility (2020/0104(COD)); Commission Notice, Technical guidance on the application of “do not significant harm” under the Recovery and resilience facility Regulation, Brussels, 12.2.2021, C(2021)1054 final. Cf. A. Sikora, *European Green Deal – legal and financial challenge of the climate change*, “ERA Forum” 202121:681-697, <https://link.springer.com/content/pdf/10.1067/s12027-020-00637-3.pdf> (accessed 31.08.2022). See also Building resilience: WWF recommendations.

evaluation of the economic value of such aspects of environment as biological diversity or ecosystem is difficult to be put into legal standards. Therefore, it rests legally unclear and remains in the hands of lawmakers and judges.

3. BIODIVERSITY RESILIENCE BUILDING – THE PERSPECTIVE OF THE EGD, BS AND THE 8TH EAP

Biodiversity resilience building is of key importance for both the building and restoration of the resilience of the natural environment, which in effect always means some stage in the resilience building process, but with a varied intensity of tasks²². From the perspective of international law, the biodiversity-related issues became particularly important when the international community realised the importance and significance of facts demonstrating that human activities lead to a drastic reduction of biodiversity on which the functioning of life-supporting systems in the biosphere, including human life and well-being, depends²³.

The provisions of Section 2.1.7 of the EGD address the biodiversity issues from the perspective of preserving and restoring ecosystems, as well as preserving and restoring biodiversity, emphasising the importance of those issues for the implementation of the EGD objectives. The EGD Communication announced the adoption of two documents on those issues; specifically, the BS, which was introduced into the EU legal space on 5 May 2020, and a new 8th EAP, containing a new monitoring mechanism designed to ensure that Europe attains its environmental objectives²⁴. The EAP provides the basis for the launch of legally binding

²² The term “biodiversity” means the variability of living nature at all the levels of its organisation, i.e. the genetic material, populations, species and ecosystems, while “ecosystem” is defined as a complex ecological system which is repeatable in the same type of the environment creating the living conditions of organisms and which is inhabited by a set of interrelated species creating a biocenosis, <https://encyklopedia.pwn.pl/haslo/biocenoza;3877787.html> (accessed 30.07.2022).

²³ The first international agreement to express the global dimension of the concern of the community about biodiversity was the Convention on Biological Diversity adopted at the so-called World Summit in Rio de Janeiro in 1992. The primary objectives of the Convention include the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. For the purposes of the Convention, to which the European Union is also a Party, “biological diversity” has been defined as the variability among living organisms from all sources, including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part. This includes diversity within species, between species, and of ecosystems. In turn, the Convention has defined “ecosystem” as a dynamic complex of plant, animal, and micro-organism communities and their non-living environment interacting as a functional unit (Art. 2). The text of the Convention is available at: <https://www.cbd.int/convention> (accessed 30.07.2022).

²⁴ The 7th Programme ended on 31.12.2020.

measures to attain the EAP objectives, including as one of its priority objectives protecting, preserving, and restoring biodiversity (Art. 2 of the 8th EAP).

The document establishing the EGD underlined that all EU policies should contribute to preserving and restoring Europe's natural capital, *inter alia*, in the form of forest areas, land resources and water resources, furthermore, referring to the standards of the integration principle in Art. 11 TFEU. Moreover, it announced that the BS would indicate specific measures to meet its objectives, *inter alia*, quantified objectives, such as increasing the coverage of protected biodiversity-rich land and sea areas building on the Natura 2000 network, and a new Forest Strategy would be prepared, also taking into account the assumptions of the BS²⁵.

It clearly follows from a review of the contents and assumptions of the EGD that durable solutions to the problem of climate change consist in a correct approach to natural resources; therefore, they need to be rationally used in order to build ecosystem resilience so that those resources are also sufficient for the future generations. For this reason, the objectives of the EGD include, *inter alia*, halting the processes of degradation of the natural environment, restoring and, in certain cases, building ecosystem resilience, since preserving and restoring biodiversity and correctly functioning ecosystems are of key importance for the processes of building the resilience of socio-economic systems.

The BS, as promised in the assumptions of the EGD, involves measures which have a multidimensional character and are designed to combat the already identified core causes of biodiversity loss, such as unsustainable uses of land and water resources, overexploitation of natural resources, environmental pollution etc.²⁶. There is no doubt that the strategy, adopted during the COVID-19 pandemic, is a central component of the plan for restoring and building environmental resilience. Since it is legally enshrined in the EGD and the 8th EAP, there are grounds for the biodiversity issue to become an integral part of a general EU strategy for economic growth through its close linkage to the general EU treaty principles laid down in Art. 3 TEU, the specific principles laid down in Art. 191 TFEU and the integration principle in Art. 11 TFEU.

The Strategy provides, *inter alia*, for the establishment of binding targets for restoring degraded ecosystems and rivers, improving the condition of European forests, habitats and protected species, limiting pollution, supporting organic farming and fostering agricultural practices favourable for biodiversity. One of

²⁵ The Commission emphasises the importance of forest areas for climate change mitigation and points out the need to improve their quality and to increase their surface area as the preconditions for the EU achieving climate neutrality and a healthy natural environment. For more on Natura 2000, see M.M. Kenig-Witkowska, *NATURA 2000 – The European Union mechanism for nature conservation: Some legal issues*, "Journal of Comparative Urban Law and Policy" 2017, Vol. 2, issue 1.

²⁶ It should be emphasised that the Commission also undertakes to submit a proposal for an amendment to the Regulation on the Aarhus Convention to ensure improved access to justice of natural persons and nongovernmental organisations in environmental matters (Section 3.2).

the core objectives of the Strategy is to build and restore the resilience of ecosystems and to appropriately protect them. In light of this objective, in its Section 2, the Strategy directly provides for the protection and restoration of nature in the EU. Hence, the Strategy proposes the improvement and enlargement of the European network of protected areas and the preparation of the EU plan for restoring natural resources. At least 30% of land areas and 30% of sea areas in the EU should be protected.

In the context of these assumptions, special importance is attributed in the Strategy to areas with a very high biodiversity value for which it has proposed the establishment of binding targets. Under these targets, at least a third of the EU's protected areas, i.e. 10% of land areas and 10% of sea areas, should be subjected to strict protection. Emphasis should be placed on the strict protection of all remaining EU primary and old-growth forests. Therefore, the Strategy also proposes establishing a truly coherent and resilient Trans-European Nature Network and setting up ecological corridors to prevent genetic isolation and to maintain healthy ecosystems. Member States have until 2023 to designate new protected areas and ecological corridors (Section 2.1). The Strategy also provides for measures to restore land and sea ecosystems.

From the point of view of the efficiency and effectiveness of EU environmental law, the provisions of the Strategy concerning the development of the EU legal framework for nature restoration are particularly important. The starting point for those measures are the Commission's findings in Section 2.2.1 of Strategy that there are implementation and regulatory gaps in this area which hinder the effective protection of ecosystems. Their examples include no requirement for Member States to have biodiversity restoration plans and no requirement to comprehensively map, monitor or assess ecosystem services, health or restoration efforts. There are also gaps in the implementation of the already existing legislation. The Commission has announced that it will put forward a proposal for legally binding EU nature restoration targets to restore degraded ecosystems. The Commission will also request Member States to ensure no deterioration by 2030 in conservation trends and status of all the protected habitats and species listed in the so-called Birds Directive and Habitats Directive, referring to the non-regression principle applied in international law²⁷.

²⁷ Probably, this will be a very interesting contribution to the discussion on the legal character of the EU environmental objectives. The thesis of a legally binding character of the objectives and tasks of the European Union has been maintained by the case law of the European Court of Justice which has indicated that the regulations laying down the EU objectives and tasks have not only the character of general programming assumptions but are also legally binding. Still, certain restrictions arising from this position should not be ignored, since, in general, the regulations of the objectives do not include competence provisions. The general objectives under the Treaties are legally binding for all the institutions operating within the European Union. In contrast, they are not legally binding for the EU Member States, although certain elements of such an obligation can be inferred from the provisions of Art. 4(3) TFEU which stipulates that the Member States should

The Strategy also lays down the EU commitments related to nature restoration in the context of the announced stepping up of implementation and enforcement of EU environmental legislation (Section 3.2). As regards the core acts of secondary law on biodiversity, i.e. the so-called Birds Directive²⁸ and the so-called Habitats Directive²⁹, the enforcement of the legislation will focus on the completion of the EU project of the Natura 2000 network. In relation to this, the Commission will also ensure a review and revision of environmental legislation with an impact on biodiversity.

Particularly much attention is paid in the Strategy to restoring the good environmental status of marine ecosystems. For the implementation of those tasks, the Commission will propose a new action plan to conserve fisheries resources and protect marine ecosystems (Section 2.2.6). The Strategy also raises the issue of restoring freshwater ecosystems and the natural functions of rivers. To this end, at least 25,000 km of rivers will be restored into free-flowing rivers (Section 2.2.7).

An extremely important part of the Strategy indicating the global ambitions of the EU as the leader in environmental protection is its Section 4 concerned with the level of EU commitment to protecting the environment at a global scale. Given the global dimension of the Strategy, the Commission proposes that the EU, as a Party to many international environmental agreements and a partner in many international projects to improve the quality of the environment worldwide, should ensure that, as part of the international cooperation at a global scale post-2020: 1) by 2050 all of the world's ecosystems are restored, resilient, and adequately protected, 2) the process of the implementation, monitoring and review of biodiversity-related commitments is much stronger, 3) an enabling framework is in place, e.g. in such areas as research and innovation, 4) the sharing of the benefits from the use of genetic resources linked to biodiversity is fair and equitable, 5) all the stakeholders are actively involved in biodiversity protection (Section 4.1).

As part of building and restoring ecosystem resilience at a global scale, note should also be taken of the references in the Strategy to International Ocean Governance and the EU support for the conclusion of an agreement on marine biological diversity of areas beyond national jurisdiction and for the designation of three vast Marine Protected Areas in the Southern Ocean. The EU also declares that it will combat overfishing, including through World Trade Organization negoti-

facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objective. These obligations can be seen clearly in the sectoral objectives attained at the States' level through the implementation of the EU secondary law into the national legal orders.

²⁸ The text of Directive 2009/147/EC on the conservation of wild birds is available at <https://eur-lex.europa.eu>

²⁹ The text of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora is available *ibidem*.

ations on an agreement to ban fisheries subsidies which could be harmful to the environment. In line with the precautionary principle, the EU should also advocate that marine minerals in the international seabed area cannot be exploited (Section 4.2.1).

The Strategy assumes that EU trade policy will actively support the ecological transition of the European Union. In relation to this, *inter alia*, the Commission will present a legislative proposal to minimise the placing of products associated with deforestation or forest degradation on the markets of the Member States. The Commission will also take steps to crack down on illegal trade in wild fauna and flora; *inter alia*, proposing a further tightening of the rules on EU ivory trade. The Commission also considers strengthening the coordinating and investigative capacities of the European Anti-Fraud Office (OLAF) to prevent illicit trade in wild fauna and flora and the entry of illicit products into the EU market (Section 4.2.2).

In the context of the building and restoration of ecosystem resilience in time of the post-COVID-19 “new normality”, it is important to note the commitment to double financial flows to developing countries for biodiversity protection. The Commission rightly emphasises that better nature protection, *inter alia*, by restricting trade in wild fauna and flora, will help prevent the future pandemics by building socio-environmental resilience.

4. SOME COMPLEMENTARY POINTS

At the present stage of implementation of the BS one may, at most, attempt to make some remarks based on the documents analysed and a very preliminary academic discussion:

- emphasis should be placed on the fact that one of the priorities of the EGD and the 8th EAP is to restore biodiversity in Europe by 2030, based on new commitments, measures and governance mechanisms,

- when assessed from the perspective of its assumptions, the BS is a systemic long-term plan for protecting nature and reversing the process of degradation of ecosystems,

- the BS is a central component of the EU plan for restoring and building environmental resilience; since it is legally enshrined in the EGD and the 8th EAP, there is a chance that the biodiversity issue may become an integral part of a general EU strategy for economic growth,

- in accordance with the so-called green oath, the recovery plans to rebuild the economy must not support measures which do harm to the environment, in compliance with the principles of environmental law,

– the EU has put its climate change target in a legally-binding document, but not yet those to protect nature. EU needs legally-binding targets to protect nature. As regards restoring environmental resilience, including restoring biodiversity, there are large expectations related to the list of legally binding nature conservation targets promised by the Commission,

– biodiversity resilience building and restoration for the time of so-called “new normality” after the COVID-19 pandemic should be based on new standards or standards amended in accordance with the principle of non-regression,

– in order to ensure that the objectives set out in the EGD and BS attain the goal of biodiversity resilience building and restoration, a stronger process of the implementation and monitoring of the efforts of the EU and its Member States should be established with regard to the standards safeguarding biodiversity.

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