

DEVELOPING EU NATURE CONSERVATION LAW FOR GREEN ECONOMY

SUMMARY

This paper contributes to the discussion on developing regulator frameworks to provide enabling conditions for green economy. The context of this study is EU nature conservation law. The paper focuses on assessing legal instruments, rules and principles as well as underlying motivations and values of EU nature conservation law from the perspective of green economy. The analysis reveals whether the legal support necessary to deliver the vision of green economy in the context of biodiversity conservation can be achieved through incremental changes at the surface level of law, or if more or less radical rethinking of underlying principles, concepts and values of nature conservation law is needed. As a conclusion the paper proposes utilization of wider array of legal techniques in nature conservation, re-interpretation of strict provisions under the Habitats and Birds Directives, as well as development of legal principle(s) to provide guidance for the legislators on how to improve legislation and interpretation of contemporary legal rules in order to provide sound foundation for green economy.

ABSTRACT

Green economy is high on EU's political agenda. Several policy document and initiatives including EU's Europe 2020 Strategy: Strategy for Smart, Sustainable and Inclusive Growth,¹ 'Resource Efficient Europe',² and 'Roadmap for Moving to a Competitive Low-carbon Economy in 2050'³, promotes transition to green economy. Regulation plays central role in transition to green economy as it provides a framework for action; it enables, limits and encourages economic and other activities. The literature on transition and innovation tends to refer to the role of legislation as a barrier for transition due to the normative function of a legal system to provide stability and security, rather

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe 2020 A strategy for smart, sustainable and inclusive growth COM(2010) 2020 final

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy COM(2010) 2020 final

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Roadmap for moving to a competitive low carbon economy in 2050 COM(2011) 112 final.

protecting status quo than accelerating transition.⁴ Thus removal of legal bottlenecks, such as inflexible standards and administrative hurdle, are seen as key element in enabling the transition. This is, however, only one side of the coin and law can also be a conduit for transformation.⁵ Law is not a static system, but a constantly evolving one that is capable of responding to societal changes and new scientific knowledge.⁶ Legal research is needed to make sure that law works for the transition rather than hindering it. This paper aims to contribute to the discussion on how contemporary EU regulatory frameworks are aligned with the idea of green economy and how they should be developed in order to provide enabling conditions for green economy. The focus of the study is EU nature conservation law. The topic is timely as EU commission has decided to undertake a Fitness check of EU Nature legislation as a part of its REFIT programme.⁷ The programme aims to make EU law simpler and to reduce regulatory costs, thus contributing to a clear, stable and predictable regulatory framework supporting growth and jobs.⁸

This study utilizes Tuori's model of three levels of law: surface level of law, legal expert culture, and deep structure of law.⁹ According to Tuori, legal activity, such as legislating, litigating and adjudicating takes place at the "surface level of law". The middle level in the law "legal expert culture" consists amongst others of principles which guide interpretation of the law and which may, sometimes invalidate or limit some of the legal activity at the surface. The most stable level of all is the "deep structure of law", which largely consists of human rights. These different levels interact with each other. On one hand the deeper structures of law limit the activities at the surface level. On the other hand the activities at the surface level shape the underlying deeper structures of law including legal principles, and human rights. The conflicts between new legal approaches, instruments and attributes required for creating enabling legislative framework for green economy may be found at different levels of law; at the surface level, the substantial norms, legal goals and practices can support existing harmful activities or create barriers for adopting new ones.

⁴ *van Elburg, Coen J. and Loorbach, Derk*: A Transition Perspective On Regulation and Renewable Energy. The European Business Review. available at: <http://www.europeanbusinessreview.com/?p=7757>

⁵ *Dernbach John, C.*: Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools. *Tulsa Law Review*. Vol 1 Issue 4/2008, p. 93-120.

⁶ *Tuori, Kaarlo*: *Critical Legal Positivism*. Aldershot, Ashgate, 2002

⁷ http://ec.europa.eu/smart-regulation/refit/index_en.htm

⁸ *Ibid.*

⁹ Tuori n. 10 above.

As explained by Tuori, evolution happens at all levels, but at different phase.¹⁰ The evolution is most rapid, and at the surface level.¹¹ As an example of such an evolution, the studies on economic value of biodiversity and ecosystem services such as TEEB¹² have underpinned new environmental regulatory experiments, such as payments of ecosystem services, around world.¹³ The introduction of these new regulatory instruments may be seen as an indication that changes at the surface level are already happening. However, changes happen, and may be needed also in the deeper levels of law.¹⁴ This study aims to reveal whether the legal support necessary to deliver the vision of green economy in the context of biodiversity conservation can be achieved with incremental changes at the surface level of law, or if more or less radical rethinking of underlying principles, concepts and values of nature conservation law is needed.

The study concludes that EU nature conservation law utilizes rather narrow range of legal techniques relying on traditional state driven approaches, leaving the responsibility over nature conservation mainly on states to be pursued by direct regulatory powers. Adopting green economy approach in EU nature conservation law would entail utilizing wider array of legal techniques, which would leave more scope for private sector initiative. Some of the new innovative regulatory tools for nature conservation proposed in green economy policy documents, such as conservation banking, offsetting schemes or tradable development rights would entail rather major changes in deeper level of law and people's relationship with nature, because these instruments can be viewed as privatization of conservation converting wildlife from common heritage to a commodity.¹⁵ As activities at the surface level of law gradually affect the deeper structures of law, it is important to recognize the different values and relationship between humans and nature embodied within different instruments utilized in nature conservation.

In addition to the utilization of wider range of regulatory instruments, changes in key nature conservation directives, i.e. Habitats and Birds Directives, or in their interpretation are likely needed, as the prevailing strict interpretation of these directives may even stand in a way of sustainable development projects. The strict interpretation of the Habitats and Birds directives by the European

¹⁰ Ibid.

¹¹ Ibid.

¹² TEEB – The Economics of Ecosystems and Biodiversity for national and International Policy makers – Summary: Responding to the Value of Nature.

¹³ *Morgera, Elisa and Savaresi, Annalisa: A Conceptual and Legal Perspective on the Green Economy. Review of European community & International Environmental Law. RECIEL 22 (1) 2013, p. 14-28.*

¹⁴ Ibid.

¹⁵ Reid, Colin, *Towards a Biodiversity Law: The Changing Nature of Wildlife law in Scotland*, *Journal of International Wildlife Law & Policy* 2012/15:3-4. 202-227, at p. 225.

Union Court of Justice (EUCJ) has been based on conventional formulation of precautionary principle, i.e. in dubio pro natura. However, as explained by Doremus another approach to precautionary principle, which focuses on learning as a form of precaution, could provide better basis for sustainable development. The rationale behind this approach is that uncertainty can be reduced over time through gradual learning and management decisions improved according new knowledge gained.¹⁶ This formulation of precautionary principle would provide flexibility needed to utilize adaptive management and support development of innovative and sustainable land use and natural resources management practices.

Finally the study proposes development and adoption of new legal principle(s), in order to provide sound basis for developing legislation for green economy and guiding interpretation of existing norms to support transition to green economy. One of the emerging new principles that could provide such a basis for green economy include principle of resilience.¹⁷

¹⁶ Doremus, H. Precaution, Science, and Learning While Doing in Natural Resource Management

¹⁷ De Lima Demange, 'Principle of Resilience in International Environmental Law' Nordic Journal of Environmental law (2013).