

**THE TRAJECTORY OF THE CIRCULAR ECONOMY UNDER THE  
EUROPEAN GREEN NEW DEAL**

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## **I. INTRODUCTION**

In the trajectory of the European Green New Deal<sup>2</sup>, which focuses on the ecological and digital transition, it is crucial to determine which economic paradigm can ensure the competitiveness of the economic system and the sustainability of the ecosystem in the face of the global challenges of climate change and the recovery of Union after the health emergency.

Therefore, to achieve ecological transition<sup>3</sup>, it is essential to move away from the linear development model, consistent with the 2018 package of directives on the circular economy; in particular with dir. 851/2018.

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<sup>1</sup> On the new European Green New Deal, v. Brussels, 11.12.2019 COM (2019) 640 final. See Piano Nazionale di Ripresa e Resilienza (PNRR) – Italia, 2021.

<sup>3</sup> The presentation of the new package of directives on the circular economy took place on 2 December 2015, during a plenary session of the European Parliament by Vice President Katainen. *The new package was composed of the Communication ‘The Missing Link - Action Plan in the European Union for the circular economy’* (Bruxelles, 2.12.2015 COM (2015) 614 final) and accompanied by some legislative proposals for the revision of the EU directives on waste. The underlying logic of the design contained above all in Dir. 2018/851, art. 1, par. 1, point 10, is mainly expressed in the design and production of products that do not become waste or become waste only in the long term. More specifically, there is an obligation for States to adopt measures aimed at avoiding the production of waste which at least: a) promote and support sustainable production or consumption models; b) encourage the design, manufacture and use of resource efficient products; c) relate to products that contain critical raw materials to prevent them from becoming waste.

In this article, the methodological approach necessary to understand the new model of economic development will be investigated, the extent of the change it has given to the economic and institutional system will be clarified and the most appropriate environmental administrative law status will be questioned.

Finally, we will focus on the decision-making procedures and the necessary synergies between subjects and areas of intervention necessary for its affirmation and on the operational features in which this is most expressed.

The sketch outlined by the Green New Deal confirms the European conceptual framework of the circular economy, which is broader than mere waste management, as it is meant to become a fundamental part of the European industrial strategy, to generate value and attract investments<sup>4</sup>. This change was already evident in the opening words of the directive n.851/2018; the first recital hoped for the improvement and transformation of waste management into a *«sustainable management of materials to safeguard, protect and improve the quality of the environment, protect human health, guarantee a prudent, efficient and rationality of natural resources, promote the principles of the circular economy»*.

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See Commission Notice, Guidance on Innovation Procurement (2021/C 267/01) (GUCE 06.07.2021 EU Council Conclusions, “Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy” Brussels, 25 November 2020; COM(2018) 32, Communication on the implementation of the circular economy package: options to address the interface between chemical, product and waste legislation. COM(2018) 29 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a monitoring framework for a circular economy.

<sup>4</sup> On the New Industrial Strategy for Europe, Brussels, 10.3.2020 COM (2020) 102 final.

In fact, it is confirmed that the new model affects the entire industrial process of designing and producing goods and therefore the entire supply chain, right from the selection of raw materials, chosen by virtue of their possible reuse. In fact, the design of fully repairable and durable goods represents, upstream, the real possibility of our Country to success in its implementation<sup>5</sup>.

In this sense, the Ecodesign Directive<sup>6</sup> regulates adequately energy efficiency and certain circularity characteristics of energy-related products. Through an appropriate initiative of the Commission, the scope of this directive will have to extend to a wider range of products and services, far beyond those related to energy, so that through the phase design, circularity invests more extensively in the entire production system.

In the new European Industrial Strategy, which treats companies as guiding subjects of the transition towards the circular economy, the perspective is as broad as that adopted by the European legislator, as the intention is to *«revolutionize the way we design, transform, use and eliminate objects, encouraging European industry»*.

The competitive advantage of Italy precisely in the field of industrial design justifies its ranking in first place in the Report for the circular economy also in 2021<sup>7</sup> and in the

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<sup>5</sup> On this front, the approach followed by the National Resilience and Recovery Plan, which confines the circular economy mainly in the shadow of waste management with the aim of reducing its impact on the environment, is very reductive.

<sup>6</sup> Directive 2009/125 / EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (OJ L 285 of 31.10.2009, 10).

<sup>7</sup> The Report is prepared every year by the Circular Economy Network in collaboration with ENEA

GreenItaly 2020 report by Symbola and Unioncamere in the circular use of furnishing wood and in sustainable agriculture.

In this way, the most accredited definition of the circular economy, namely that of the Ellen Mac Arthur Foundation, receives confirmation and becomes tangible: *«the circular economy is a conceptually regenerative industrial economy that reproduces nature in actively improving and optimizing systems through which operates»*.

It is no coincidence that the Action Plan for the circular economy of March 2020 specifies that *«a progressive, but irreversible transition towards a sustainable economic system is an essential element of the new industrial strategy of the Union»*<sup>8</sup>.

This conceptual framework appears essential to understand how a circular evolution of the economic system, facilitated and favored by the increase in connectivity generated by the digital transition, produces many changes in the traditional way of conceiving the relationship. Between the economy and the environment and to interpret the same evolution of our economic Constitution, at section 3 of art. 41.

## **2. THE APPROPRIATE METHODOLOGICAL APPROACH**

The choice of the methodological approach is influenced by the new EU approach towards Circular Economy: starting from the Green New Deal and all along the adoption of policies to overcome the current health emergency, environmental issues are meant to lead the European Union towards a social and economic restart.

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<sup>8</sup> See COM (2020) 98 final, *A new action plan for the circular economy. For a cleaner and more competitive Europe, of 11 March 2020*.

In fact, the achievement of the Next Generation EU requires that, in addition to the focus of digitization and ecological transition, all projects (none excluded) respect the «(Pareto) principle of green improvement» or the «do not substantial harm» (i.e. improve on at least one of the six environmental dimensions without worsening the others).

A method of «verification of sustainability» is also outlined, according to which the promoters of projects exceeding certain dimensions will be required to assess their environmental, climatic and social impact.

The policy-maker will therefore have to calculate the effects of European policies on the six environmental dimensions defined by the taxonomy of the European Union: climate adaptation and mitigation, air pollution, water use, circularity of the economic process and impact on biodiversity. It requires, on the part of the jurist, a necessary interdisciplinarity.

The study of the ecological transition will therefore require, on the part of the legal expert, the humility to go beyond one's own disciplinary boundaries and, at the same time, the daring to follow new paths. In fact, dealing with the circular economy means, for a legal scholar, to associate their specific legal and economic skills with a general knowledge on natural sciences, for what concerns the characteristics and nature of the different energy sources and the impact of the different choices of production and consumption on the ecosystem and the biosphere<sup>9</sup>.

There is, however, an objective unity of knowledge, with respect to which all the various sciences are nothing other than the product of a single activity of the human intellect; in scientific research, however, alongside the increasingly accentuated diffusion of specialist

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<sup>9</sup> Even the British government, now outside the EU, has entrusted one of the world's best-known economists, Partha Dasgupta, with the task of drafting a report where economic models and policy choices are completely redefined starting from the assumption of system integration economic in the ecosystem.

sectors, the need to integrate the various sectors of knowledge emerged at the same time in order to have a unified and comprehensive vision of the complex problems analyzed from multiple specialist points of view.

The necessary interdisciplinary projection of the methodological approach, however, does not in any way produce a marginalization of the science of administrative law and, more generally, of legal science in the analysis of these issues. GD Romagnosi wrote that «*all sciences join hands interchangeably*», adding that «*perhaps there is none in which the alliance should be greater than in that of law and social utility*»<sup>10</sup>. This minority appears to be averted above all due to the way the relationship between the rationality of economic science and that of legal science unfolds in the European regulation of circularity.

The separation between them that started from the second half of the 1980s had in fact generated a progressive domination of the methods and mechanisms of economic rationality, reinforced by the rigid and formalistic interpretation of European rules, on the financial constraints of Member states<sup>11</sup>.

This dominance is gradually overcome, especially in the European regulation inherent in the framework of the Green New Deal, not so much by replacing the conceptual categories typical of economic science; some of these, in fact, such as those of efficient use of resources,

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<sup>10</sup> GD ROMAGNOSI, *Opere, rearranged and illustrated* by A. DE GIORGI, vol. III, *Scritti sul diritto filosofico*, Milan, 1842, 107, where it is specified that "to say that the sciences join hands reciprocally, he is to say the same that all truths are interchangeably connected". The passage is recalled by F. GASPARI, *Città intelligenti e intervento pubblico*, in *Dir. dell'ec.*, 2019, issue 1, p. 103.

<sup>11</sup> This dynamic was effectively highlighted by M. Goldmann, *The Great Recurrence. Karl Polanyi and the Crises of the European Union*, in *European Law Journal*, 2017, 272-289.

competitiveness and cost-benefit analysis, actually preserve their centrality in the new institutional design.

The novelty consists rather in their necessary projection towards the achievement of values of a solidarity and social nature. The ecological transition of the Union is in fact also called to be characterized as a just evolution, that is, fully consistent with the solidarity values of the European constitutional tradition<sup>12</sup>. In order to ensure fairness and justice of the transition, the allocation of investments for a sustainable Europe will have to take into account, for example, the ability of Member States to address environmental challenges based on their level of economic development. The previous conceptual and substantial domination of the categories of economic science over those of legal science is therefore overturned in a symmetrical balance of fruitful and reciprocal grafts. As the Commission itself states: 'It also aims to protect, conserve and improve the EU's natural capital and to protect the health and well-being of citizens from environmental risks and their consequences. At the same time, this transition must be just and inclusive'. It was noted that the same principle of efficiency of administrative action is destined to have different meanings and values depending on the context in which it is affirmed<sup>13</sup>. In the regulation of the circular economy, the principle of

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<sup>12</sup> In this sense, allow me to refer to M. Cocconi, *La regolazione dell'economia circolare*, Milan, Franco Angeli, 2020. See R. Ferrara, *La tutela dell'ambiente e il principio di integrazione* in *Rivista giuridica di urbanistica*, 2021; n. 1; C. Feliziani, *Industria e ambiente. Il principio di integrazione dalla Rivoluzione Industriale all'economia circolare* in *Diritto Amministrativo*, 2020, 843 - L. Dawson, *Our Waste, Our Resources: A Strategy for England - switching to a circular economy through the use of extended producer responsibility*, in *Environmental Law Review*, 2019, 210-218; S. Thomas, *Law and the circular economy* in *Journal of Business Law*, 2019, 62-83.

<sup>13</sup> See. L. Torchia, *L'efficienza della Pubblica Amministrazione fra ipertrofia legislativa e atrofia dei risultati*, Relazione tenuta il 64° Convegno di Studi amministrativi su Sviluppo economico, vincoli finanziari e qualità dei servizi: strumenti e garanzie, Varenna, 20-21-22 settembre 2018.



efficiency, especially with regard to the use of resources, is not characterized as aimed at compressing the solidarity values of the constitutional tradition common to the European nations. Conversely, this connotes itself as specifically intended to realize these values.

### 3. ECONOMIC TRANSITION: FUNDAMENTALS AND FUTURE

The theme of the unsustainability of Linear Economy, characterized by the well-known sequence: «*Take, make, dispose*», is certainly not new, nor does the emphasis recently placed by an authoritative group of scholars on the consequent necessity to rethink the relationship between the economy and the environment appear entirely original.

Since the 1972 Report on «*The Limits to Development*», commissioned to the Massachusetts Institute of Technology by the Club of Rome, the urgency to rethink the development model was based on the fear of an exhaustion of natural resources and the consequent need to preserve its minimum ecological levels. It was a proposal for revision which, while evoking the limits of the linear model, nevertheless moved within its own logic and rationality, which in reality was not completely disavowed.

A more marked approach to the conceptual paradigm of the circular economy, albeit with the use of the noun cyclical economy, occurs later with Walter Stahel's report «*Potential for substitution manpower for energy*» delivered in 1976 to the European Commission and subsequently published as volume.

Stahel proposes to extend the life cycle of products, to reconsider the value of waste, to extend the responsibility of companies also to the post-sales phase, to favor a transition towards an economy that offers services rather than products, promoting greater efficiency in use of resources, as well as an increase in employment<sup>14</sup>.

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<sup>14</sup> STAHEL W., *Jobs for Tomorrow: The Potential for Substituting Manpower for Energy*, Vantage Press Inc., New York, 1982

Shortly thereafter, the terms of «*Industrial Ecology*» and «*Industrial Symbiosis*» were coined by the American physicist Robert Ayres<sup>15</sup>: that is, it is understood that the industrial system (technosphere) is a factor in the metabolism of the biosphere and that every aspect of the technosphere has its counterpart in the biosphere.

In other words, the technosphere is called upon to imitate the functioning of the biosphere, capable of using energy and resources efficiently: the goal is the enhancement of resources with the creation of closed cycles that give life to waste transformed into new material<sup>16</sup>.

The public debate on the necessary transition towards the circularity of the economic system is completely located in the path traced by Stahel which does not concern the limits to industrial development imposed by the environmental instance therefore configured as a cost; internally, the phase following the take and make is not actually the dispose but a possible reuse of the waste in the production process.

Consistent with this perspective is the "*decoupling oriented*" policy contained in Agenda 21 of 1998, aimed at separating growth from the use of materials and energy, increasing well-being and decreasing the use of resources: "*Factor for: doubling wealth, having, resource use*".

Actually, studies are now unanimous in affirming that the risk of unsustainability of the system does not consist so much in the exhaustion of non-renewable natural resources, at least in the short term. The relative criticality consists, rather, in the pressure deriving from

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<sup>15</sup> AYRES R. U., *Industrial Metabolism*, in *Technology and Environment*, 1989, 23-49.

<sup>16</sup> For an effective analysis of the evolution of the theorization on the circular economy v. M. Frey, *Genesi ed evoluzione dell'economia circolare*, in *RQDA*, n. 1/2020, 163-181.

the growing demand for raw materials, not balanced by the presence of easily accessible resources that do not pose problems on the geopolitical security side.

In fact, the Union largely depends on the import of raw materials to emerging economies with a consequent vulnerability, in terms of prices and market volatility, to geopolitical factors of third countries that undermine their independence and economic autonomy.

A greater availability of raw materials generated by waste would therefore allow national companies to obtain savings on spending on materials and increase employment.

Furthermore, the access to raw materials and the availability of energy resources represent a strategic security issue for Europe's ambition to achieve the Green Deal. Ensuring the supply of sustainable raw materials, in particular those essential for clean technologies and digital, space and defense applications, differentiating their offer from both primary and secondary sources, is therefore one of the fundamental conditions for the transition to take place. Ecological and energetic.

The perspective therefore is to question the way environment is perceived as a limit or alternative to industrial development. The issue of the exhaustion of natural capital is therefore overshadowed by the identification of technical solutions that allow it to be used without waste or dispersion.

In reality, the logic is that of a paradigm in which environmental issues, integrated in the redefinition of the industrial process itself, converge and are not opposed to those related to economic competitiveness and employment.

In this perspective, these do not constitute limits to industrial development but become real drivers of economic and social progress. The transition towards circularity is therefore characterized as a fundamental step towards eco-innovation of process and product, of new research and development programs, of an acceleration of technological progress.

As stated in the Communication on the new Industrial Strategy of the European Union: «This approach based on greater circularity will lead to a cleaner and more competitive industry by

mitigating the repercussions on the environment, easing competition for access to limited resources and reducing production costs. The economic motivation is as strong as the environmental and the moral imperative».

As noted<sup>17</sup>, in this perspective the economic Constitution itself assumes an innovative meaning, where paragraph 3 of art. 41 of the Constitution, transforms the limits to economic initiative into propulsive and positive factors of its own productivity and efficiency through the orientation of public powers to companies towards a circular type production. hence, the economic Constitution itself is revitalized to some extent, specifically the third paragraph of art. 41 of the Constitution; a renewed area of industrial policy is affirmed green and the same freedom of economic initiative is consecrated as being able to achieve virtuous objectives in the environmental sphere through mercantile dynamics.

The limits to economic initiative, identified by art. 41, paragraph 3, of the Constitution thus become positive and virtuous objectives of the intervention of the public authorities aimed at orienting companies towards the production of eco-compatible and circular products.

The economic Constitution, instead of being connoted as incompatible with the fundamental freedoms of the European market and the protection of competition guaranteed within it, can therefore become an engine for the affirmation of the new European development paradigm.

The emergence of the new paradigm, in fact, is fueled by and can in turn increase the availability of more jobs. In fact, to implement the circular economy, high-intensity and highly skilled sectors are needed that will lead companies to increase the supply of work with a positive impact on employment both from a qualitative and quantitative point of view.

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<sup>17</sup> F. De Leonardis, *Editoriale*, in *Dir. dell'economia*, n. 3/2019.

The new professions and skills green and circular, as shown in the aforementioned Report Greenitaly by Symbola-Unioncamere, were characterized in our country by a high educational and professional level of employees, as well as by a greater stability of the employment relationship compared to traditional occupations.

As emerges in the new European Industrial Strategy, in the global race for talent, Europe needs to invest more in skills and lifelong learning. This investment will require collective action from industry, Member States, social partners and other stakeholders through a new *'Skills Pact'* aimed at helping to enhance skills and retraining and unlocking public investment and private individuals in human capital.

Applying the principles of the circular economy in all sectors and industries could create 700 000 new jobs in the Union by 2030, many of them in SMEs.

This necessary synergy between environment/circularity and greater competitiveness of the European economic system is made very clear by the European Commission in the Europe 2020 Communication.

Here, in outlining the framework of the social market economy for the 21st century, the aim is to achieve economic model in which the more efficient use of resources and the reduction of the environmental impact of industrial waste must be combined with an increase in economic progress.

#### **4. THE STATUS OF ADMINISTRATIVE ENVIRONMENTAL LAW IN THE CIRCULAR TRANSITION**

In the European regulation of the circular economy, environmental administrative law plays an important role not so much for an innovation of its operational tools as for their contextual and joint use.

Above all, in the design of the Green New Deal we are witnessing a great change of pace, compared to the past, in the use of State intervention models. State intervention aimed at setting limits (command and control). Nowadays, the so-called adaptive management approach, which aims at orienting the market towards environmental sustainability, is coordinated and coherent with the systemic design of public policy.

In fact, the objective of reaching circularity requires a level of flexibility that only a system of incentives, although not used jointly but rather in support of public regulation, is able to achieve, rebalancing the rigidity of the recourse to authority measures alone.

The action of the public authorities is in fact flanked by that of private subjects by conditioning their activities, modifying their objectives, strengthening their technical capabilities, making available new investments conditional on the achievement of objectives established by public subjects. These aims are not only environmental but also affect the industrial strategy of the countries and the strengthening of their social cohesion.

The Investment Plan for a Sustainable Europe is the reference framework to make possible and support the initiatives of companies, third sector subjects and public administrations functional to increasing the transition towards a circular and climate-neutral economy.

The circular economy action plan will include, for example, as stated in the Communication on the Green New Deal 'measures to encourage businesses to offer, and enable consumers to choose, reusable products durable and repairable. It will analyze the need for a «*right to repair*» and counter the planned obsolescence of devices, «*especially electronic ones*».

The role of public authorities, in reality, will not be limited only to correcting market failures, but will mainly take a coherent direction to satisfy the same design of the Green New Deal, not only for promotion but also for innovation.

The pursuit of climate neutrality will require a deep restructuring of the economies of the states, structural changes in business models and the need for new skills, all profiles that require a significant investment in innovation.

As stated in the Communication on the new European Industrial Strategy, *«the circular economy today must necessarily be combined with technological innovation. Such a transformation must affect all sectors and innovation should be integrated into the process of developing European policies»*.

We could therefore speak of an innovative state as well as a promoter state.

Further tools are identified by the Commission in the reputational lever that derives from the experimentation of the *'environmental footprint of the product'*, a method capable of measuring the environmental performance of goods and communicating information on environmental matters. In the same direction, the Commission intends to increase the effectiveness and contribution to the circular economy of the EU Ecolabel, which identifies products with a reduced environmental impact over their entire life cycle.

The traditional tools of a reputational, economic and financial nature are flanked by joint tools, such as the public-private partnership for innovation and pedagogical tools, both in terms of training in the public sector and in raising awareness of private businesses.

## **5. FEATURES OF DECISION-MAKING PROCEDURES: INTERCONNECTION AND CIRCULARITY**

The decision-making process prone to ecological transition takes on a circular dynamic and a strictly interconnected way of development. This path in fact originates from below, from the request of participation of civil society, and subsequently invests institutions at various levels, both in the supranational and in the subnational dimension, which welcome the impulses coming from citizens, and translate them into public policies.

The beginning of the circularity of economy is rooted in a pact between citizens, businesses, local and national institutions and European bodies, which generates the recovery that should spring from the European New Deal.



Furthermore, the progress made in European policies aimed at these goals must be constantly communicated to European citizens and civil society must be systematically involved in the governance and implementation of the objectives of the 2030 Agenda.

Consumers and businesses are not mere recipients of the new development paradigm but are called to take on an active role as protagonists of the ecological and industrial transition towards the circular economy. In the approach given to the European plan by the Commission, the active participation of consumers and the assumption of corporate social responsibility towards the transition and the confidence in its realization are fundamental elements of the path undertaken.

European consumer policy itself will acquire a fundamental role in guiding and empowering consumers to make responsible choices and to feel that they are active protagonists of the ecological transition.

The provision of reliable, comparable and verifiable information to consumers will support them in making informed choices and avoiding becoming easy prey to greenwashing. This information should affect the life span and availability of repair services, spare parts and repair manuals.

The Commission intends to propose a revision of the consumer protection legislation to strengthen its protection against premature obsolescence of goods and inauthentic ecologism. This discipline will also be responsible for setting minimum requirements for sustainability brands/logos and information tools.

More specifically, corporate social responsibility is an emblematic factor of the choral and systemic structure of the new development model. In this regard, the Communication on the Green New Deal hopes that sustainability should be more systematically integrated into corporate governance; this would prevent many companies from still concentrating excessively on short-term financial results at the expense of long-term development and sustainability profiles.

In the same vein, businesses and financial institutions will also need to improve the transparency of climate and environmental data, so that investors are fully informed about the sustainability of their investments.

The affirmation of the circular economy, within the design of the Green New Deal, passes also through the profound interconnection of actors, areas and processes.

Even this methodology is not new. Already in Agenda 21, approved at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, a social profile was introduced in the director of environmental sustainability; in fact, it was stated that «an indispensable requirement for sustainable development» is «*the elimination of poverty and greater equity in the distribution of resources among the peoples of the world*». The principle thus began to stand, from the outset, on three pillars, environmental, economic and social, to be considered mutually interdependent.

Furthermore, one of the specificities of the 2030 Agenda for sustainable development is precisely the integration of actions and objectives, in order to redefine the new development model. The global challenges that arise, in fact, require, also for the European Commission, the abandonment or insufficiency of sectoral policies and governance mechanisms, to the advantage of a more integrated and systemic approach.

Within the Green New Deal, the Commission acquires the objectives of the United Nations 2030 Agenda on sustainable development and includes them in the macroeconomic coordination of the European Semester. The inclusion and evocation of the objectives of the 2030 Agenda, within the ecological transition designed by the Green New Deal, is due to the global dimension of the challenges to be faced which inevitably require multilevel regulation.

In this perspective, we cannot fail to refer to the New Strategic Agenda of the European Union 2019-2024, which has identified among the EU priorities that of «*building a green, equitable, social and climate-neutral Europe*»<sup>18</sup>.

It is a process of change that simultaneously affects the action of public authorities in the environmental, economic and social sphere, in which the exploitation of resources, the investment plan and the direction of technological development must take place in synergy.

The commitment of the many institutional and social actors which the legislator requires to take action to promote the realization of the new development model must therefore be cohesive.

This interconnection of actors and actions must be made possible by an implementation discipline that favors overall coherence; the action of the legislator, therefore, must make the collaboration between all the actors of the circular economy - public administrations, companies, research institutes - structural and at the same time, substantially, promote innovation and technology transfer.

The initiative developed by the various subjects, in a logic of interconnection, must also be based on solidarity both vertically, i.e. between different generations, in a manner consistent with the meaning of sustainable development contained in the Brundtland Report, and horizontally, between Countries with different levels of development, in a logic of cohesion<sup>19</sup>.

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<sup>18</sup> Adopted by the European Council in Brussels on 19-20 June 2019.

<sup>19</sup> Allow me to refer to A. D'Aloia, *Prefazione. Economia circolare e diritto: alla ricerca dei contenuti materiali della sostenibilità*, a M. Cocconi, *La regolazione dell'economia circolare*, cit. 9.

## **6. FROM THE PROTECTION OF COMPETITION TO SUSTAINABLE COMPETITION**

The intervention of the public authorities does not actually follow, in this design, a logic that hinders the dynamics of competition in the market.

This happened, for example, in the context of green procurement, which can become, thanks to the life cycle clauses, in Articles 95 and 96, and the obligation to comply with the minimum environmental criteria, a driving factor of a more sustainable way of designing and producing artifacts and, therefore, of the circularity of the economic system.

Since public administrations are among the largest buyers of goods, up to about 14% of GDP, the choice of sustainable products by them could have a very significant impact towards the effective take-off of internal circularity of the industrial process. Their significant role as buyers of products would be able to move large economic flows and therefore would have a domino effect on the relative production of environmentally friendly goods. With the clarification, in art. 34, paragraph 3, of the new Code (Legislative Decree 18 April 2016, n. 50) of «*the criteria of energy and environmental sustainability*», it introduces, in effect, the obligation to include in the project and tender documentation a minimum content consisting of the technical specifications and contractual clauses contained in the minimum environmental criteria. These criteria, as rewarding elements, are also considered for the purpose of drafting the tender documents for the application of the criterion of the most economically advantageous offer (Article 95, paragraph 6).

A central role, in orienting public contracts towards sustainability objectives, is also constituted by the award criteria, namely that of the economically advantageous offer (art. 96, paragraph 6) and the introduction of the so-called life cycle costs (Article 95, second paragraph and Article 96, first paragraph, letter b).

Through the new assessment approach based on the life cycle, which includes both internal costs and those attributable to environmental externalities, as long as they are monetized and controlled, the limits of competitiveness on the market for companies can in fact be exceeded, thus being able to investing in innovation to become more sustainable.

The use of this feature can also represent a precious opportunity to encourage private investments in innovative sectors which tend to be less attractive. Given that the fundamental characteristics of environmentally friendly products must be repairability and durability, traceability of the product life cycle will also be necessary, made possible by digital innovation and the public-private partnership for innovation<sup>20</sup>

This innovation presents, as often happens, risks and opportunities. On one hand, in fact, the use of the new award criteria will allow the contracting authorities to offer substance to the legal reserve contained in art. 30 of the new Italian Public Procurement Code for which the criterion of affordability can be subordinated to the environmental criteria. At the same time, these criteria should be applied as objective and non-discriminatory as possible in order to avoid possible distortions of competition. On the other hand, the use of several indeterminate legal concepts significantly expands the margin of technical discretion entrusted to the Contracting Authorities throughout the course of the procedure, without the possibility of anchoring to binding precepts, with all the risks associated with this. extension without the presence of adequate counterweights.

The actual achievement of environmental policies and the impetus offered to the circularity of the production system can also be favored by the use, during the tender, of certifications established by third parties for the purchase of products and services covered by the contract. The use of these certifications, which have been established regarding the effective existence of the minimum environmental criteria, actually makes them a guarantee for the achievement of the expected result from green procurement with regard to the activation of a real circularity of industrial production processes. Their use, offering greater certainty about the existence of these criteria, contrasts the grafting of distortionary dynamics of competition and contributes, vice versa, to an optimal functioning of the market.

The European energy policy was also geared towards combating climate change through an initiative to promote renewable energy and energy efficiency which aimed at favoring

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<sup>20</sup> In this sense, v. F. Fracchia, S. Vernile, *I contratti pubblici come strumento di sviluppo ambientale*, in *Dir. Ec.*, n. 2 of 2020.

economic progress by dissociating it from the use of conventional energy; the same Directive n. 28 of 2009 but, more recently, the Energy 2020 Communication and the Green New Deal itself aim to favor the functioning of the integrated energy market pervaded by the direction of a decisive energy transition towards renewable sources.

In the European initiative aimed at promoting renewable sources, the pursuit of environmental objectives and security of supply will have to be strictly combined with those of strengthening competition and integrating the energy market at European level. This initiative must in fact develop in such a way as to boost the construction of an integrated European energy market of which renewable sources are destined to constitute a driving segment.

In this initiative, the green economy can happily be combined with the circular economy in the fight against climate change, questioning the relationship between the use of conventional energy and economic and social progress.