



## HIGHLIGHT

### THE EU AND CLIMATE CHANGE

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## THE GREEN DEAL AND THE CASE FOR A SOIL HEALTH FRAMEWORK DIRECTIVE

STEFANO MONTALDO\*

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In its 2020 Report on the State of the Environment, the European Environment Agency highlighted the increasingly serious degradation of EU soils.<sup>1</sup> Soils constitute largely non-renewable resources and are vital for delivering essential ecosystem services, ranging from the mitigation of climate change to the preservation of biodiversity and the provision of food and water. However, they are under pressure from an increasing series of threats. These challenges were listed by the European Commission back in 2006, in its first European Soil Strategy: contamination, compaction, erosion, sealing, loss of biodiversity and decline in soil organic matter, floods and landslides.<sup>2</sup> Less than 20 years later, new aspects now need to be added to the list, such as acidification, excessive land-take for urbanisation purposes, and the implications of water scarcity.<sup>3</sup>

Notwithstanding the systemic importance of soil preservation and protection, the European Union has thus far failed to promote a comprehensive policy framework.<sup>4</sup>

\* Associate Professor of EU Law, University of Turin, stefano.montaldo@unito.it.

<sup>1</sup> Report SOER2020 of the European Environment Agency of 4 December 2020 on the European Environment – State and Outlook 2020, 115 ff.

<sup>2</sup> Communication COM(2006) 231 final from the Commission of 22 September 2006 on a Thematic strategy for soil protection.

<sup>3</sup> I Heuser, 'Soil Governance in Current European Union Law and in the European Green Deal' (2022) *Soil Security* 1-2.

<sup>4</sup> This is perceived as a rooted problem of the EU soil policy: I Heuser, 'Milestones of Soil Protection in EU Environmental Law' (2006) *Journal of European Environmental and Planning Law* 190. See also N Glaesner, K Helming and W de Vries, 'Do Current European Policies Prevent Soil Threats and Support Soil Functions?' (2014) *Sustainability* 9538. For a different approach, focusing on the "remarkable set of provisions and policies in place", see M. Petersen, 'European Soil Protection Law After the Setback of December 2007. Existing Law and Outlook' (2008) *European Environmental Law Review* 146.



Admittedly, the EU *acquis* is not immune from soil-related concerns, but the relevant legislation is strongly fragmented, with the topic at issue mainly featuring as an ancillary element to other priorities.<sup>5</sup> This leads to a varied panorama of EU secondary law addressing threats to soils as specific side effects of certain activities or events, such as industrial emissions,<sup>6</sup> waste management and contamination,<sup>7</sup> and agriculture-related pollution.<sup>8</sup> Although largely indirect, some beneficial consequences also derive from EU legislation establishing specialised protection for certain natural areas, for instance in the case of the Habitat Directive<sup>9</sup> or the environmental quality standards established by the Water Framework Directive for river basins, lakes and other sources of freshwaters.<sup>10</sup>

In a similar way, more recently, soil protection has been integrated into some of the *ad hoc* strategies composing the Green Deal.<sup>11</sup> For instance, the Farm to Fork Strategy stresses the need for more sustainable and efficient soil management and establishes ambitious mid-term goals to contribute to achieving this objective, with particular regard to halving the use of chemical and hazardous pesticides and reducing the use of fertilisers by 20 per cent by 2030.<sup>12</sup> In parallel, the Biodiversity Strategy addresses soils as parts of a more comprehensive scenario,<sup>13</sup> whereby the preservation of soil properties lays at the foundation of a healthier paradigm shift *vis-à-vis* enhancing an EU response specifically tailored to threats affecting soils.<sup>14</sup>

Crucially, the Commission itself perceives the absence of a comprehensive approach to soils and their protection as a loophole. Building on this awareness, in November 2021,

<sup>5</sup> C Olazábal, 'Overview of the Development of EU Soil Policy: Towards a EU Thematic Strategy for Soil Protection' (2006) *Journal for European Environmental and Planning Law* 184.

<sup>6</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

<sup>7</sup> See the so-called Waste Framework Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste.

<sup>8</sup> See for instance the Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

<sup>9</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

<sup>10</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

<sup>11</sup> L Montanarella and P Panagos, 'The Relevance of Sustainable Soil Management Within the European Green Deal' (2021) *Land Use Policy*, article no. 104950.

<sup>12</sup> Communication COM(2020) 381 final from the Commission of 20 May 2020 on a Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system.

<sup>13</sup> Communication COM(2020) 380 final from the Commission of 20 May 2020 on the EU Biodiversity Strategy for 2030. Bringing nature back into our lives.

<sup>14</sup> L Montanarella and P Panagos, 'The Relevance of Sustainable Soil Management' cit. 4, according to whom "[i]ncorporating a coherent sustainable soil management framework within all three strategies will be challenging, given the necessary trade-offs between sometimes contradicting goals and targets".

the Guardian of the Treaties issued a long-awaited new EU Soil Strategy for 2030.<sup>15</sup> The Communication outlines the Commission's renewed agenda for soil protection and identifies some mid- and long-term objectives on a variety of plans. For the first time, it focuses specifically on soil-oriented measures, such as increasing the capacity of soils to absorb greenhouse gas emissions through carbon removals and reducing land-takes and soil sealing by extending the circular economy hierarchy cycle to land use and planning.

It is important to stress that the Strategy is not a standalone document. Although the Communication in question is not formally part of the Green Deal package, the Commission makes it clear that the actual achievement of the ambitious EU environmental goals for 2030 and 2050 is largely dependent upon a stronger common soil management policy at EU level.<sup>16</sup> The Strategy is also closely connected to other EU policies stemming from the Green Deal and is not to be developed and implemented in isolation.

The distinctive feature of the Soil Strategy for 2030 is the Commission's commitment to tabling a dedicated legislative proposal on soil health by 2023. This initiative will build on the successful experience of the pre-existing EU environmental framework legislation. In fact, the proposal will be aimed at establishing an "adequate legal framework granting soil the same level of protection as water, marine environment and air",<sup>17</sup> which have been the subject of comprehensive EU measures over recent decades, ultimately resulting in forward-looking Union legislation.<sup>18</sup>

The substance of the Commission's proposal will cover a variety of elements of the soil protection cycle. The Strategy envisages, for instance, the establishment of (possibly) legally binding quantitative objectives, such as the reduction of soil nutrient losses by 50 per cent. Moreover, it focuses on some current normative gaps, such as the identification of clearer requirements for the sustainable use of soil, the definition of net land-take and the imposition of progressive limits to this practice in favour of less disruptive alternatives,<sup>19</sup> more advanced rules on the restoration of contaminated sites, and the development of an EU priority list for contaminants of major and/or emerging concern. The Commission is also assessing the technical and political feasibility of introducing soil health certificates for land transactions, which already exist in some Member States.

However, it is currently too early to predict with any reliability the content of the Commission's proposal in detail. In fact, its substance and – ultimately, and most importantly

<sup>15</sup> Communication COM(2021) 699 final from the Commission of 17 November 2021, EU Soil Strategy for 2030. Reaping the Benefits of Healthy Soils for People, Food, Nature and Climate.

<sup>16</sup> *Ibid.* 1-2.

<sup>17</sup> *Ibid.* 4.

<sup>18</sup> See for instance the Water Framework Directive Directive 2000/60/EC cit., which has proven to be fit for purpose. See for instance the Staff Working Document SWD(2019) 439 final of the Commission of 10 December 2019, Fitness Check of the Water Framework Directive and the Floods Directive.

<sup>19</sup> On the link between this objective and existing national best practices and concerns, EM Schatz and Others, 'Land Take in Environmental Assessment: Recent Advances and Persisting Challenges in Selected EU Countries' (2021) Land Use Policy, article no. 105730.

– its fate will depend on the outcomes of the pending pre-legislative initiative work, namely the impact assessment, the subsidiarity check and the “broad and inclusive consultation with Member States, the European Parliament and all relevant stakeholders”.<sup>20</sup> The Commission is taking this preliminary step very seriously, as the forthcoming legislative proposal is rising from the ashes of a previous initiative, which resulted in a resounding political failure. In September 2006, the Commission issued a proposal for a Soil Framework Directive,<sup>21</sup> which required the Member States *inter alia* to identify areas where soil degradation processes had occurred or were likely to occur, and to draw up an appropriate programme of measures, including risk reduction targets, an implementation schedule and a financial plan. Furthermore, the proposal strengthened the reporting and information disclosure obligations incumbent upon the national authorities, with a view to enhancing public access to the relevant data and to increasing the accountability of the institutions and bodies involved in the multilevel soil management cycle.

The initiative was based on art. 175(1) TEC, namely the general treaty legal basis allowing for the implementation of the EU environmental protection objectives established in the then art. 174 TEC, by means of the co-decision procedure. Notwithstanding the parliamentary willingness to support the draft Framework Directive,<sup>22</sup> the negotiations within the Council soon stalled due to repeated claims of the unsuitability of the legislative initiative from a subsidiarity perspective. Ultimately, compelling subsidiarity concerns and perplexities regarding excessive costs and administrative burdens for the domestic administrations were voiced and a decisive minority of States encompassing the United Kingdom, Germany, France, Austria and the Netherlands was able to quash the decision-making process.<sup>23</sup> The Commission kept the proposal in a limbo for some years before finally deciding silently to withdraw it, in 2014.

<sup>20</sup> Communication COM(2021) 699 cit. 4.

<sup>21</sup> Communication COM(2006) 232 final from the Commission of 22 September 2006 on a proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC.

<sup>22</sup> See for instance the legislative resolution of the European Parliament of 14 November 2007 on the proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC. In 2021, the Parliament has called for comprehensive EU legislation on the matter, thereby supporting the Commission's new strategy and the prospect for a new proposal for a framework Directive: see the Resolution of the European Parliament of 28 April 2021 on soil protection.

<sup>23</sup> No official Council statement was made public. The few information available derive from the declarations of the representatives of the blocking States, which have been summarized by Y Chen, ‘Withdrawal of the European Soil Framework Directive: Reasons and Recommendations’ (2019) *Journal of Sustainable Development* 1.

The claimed violation of the principle of subsidiarity and its implications on the fate of the Commission's proposal triggered general criticism.<sup>24</sup> In light of the two-pronged subsidiarity test,<sup>25</sup> at the time, the argument that the Member States' uncoordinated action had been largely insufficient in tackling the threats to EU soils was difficult to dismiss. However, the idea that a Union intervention may be more effective than a variety of national interventions was a matter of debate within the Council, with some Member States pointing out national primary responsibilities on the management of their own soils and lands. This line of argument was, however, largely unsubstantiated, as it completely overlooked the available scientific evidence on the eco-systemic (and borderless) functions performed by soils and the EU-wide – if not global – implications for climate change.<sup>26</sup>

The rapid worsening of global warming and soil deterioration over the last 15 years provide further evidence of what was already clear at the time of the failed legislative proposal.<sup>27</sup>

Be that as it may, this precedent still remains a political hot potato, requiring the Commission to approach the consultation and subsidiarity check phase with care. From a formal viewpoint, while the relevant Treaty bases have been re-numbered from arts 174 and 175 TEC to arts 191 and 192 TFEU, their substance has not been altered. As this choice was not questioned on the occasion of the first proposal, the Commission will reasonably base its initiative on this general EU environmental policy legal basis once again, just as it did, for instance, for the Water Framework Directive.

Rather, if compared to the 2006 proposal, the content of the new legislative initiative will probably be even more ambitious and demanding for the Member States in terms of legal obligations and the assignment of responsibilities to the EU. The Commission seems willing to avoid any excessive proceduralisation of environmental objectives – one of the controversial elements of the original proposal – but the broad discretion likely to be enjoyed by the Member States will have to be positioned as part of a strongly strengthened systemic approach to soil management and soil-related binding quantitative achievements.

<sup>24</sup> See for instance L Phillips, 'Opposition to EU Soil Directive "Not Logical", Commission Says' (16 March 2010) EUObserver euobserver.com; F Varvello and S Montaldo, 'Agricultural Use of Land as a Global Public Good' (2013) Federalismi.it www.federalismi.it.

<sup>25</sup> As it is renowned, the principle requires the action of the Member States to be sufficient with a view to attain a given objective, while the EU intervention should be better than the domestic one. For a deeper analysis of the criticalities connected to this test, see A Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press 2002).

<sup>26</sup> In addition to scientific evidence on the generally rapid degradation of EU soils, few existing studies contend that the fragmentation of EU soil policy is reflected also at the domestic level and that this fragmentation is a further element in support of a common and comprehensive EU legal framework. See for instance P Stankovics, G Tóth and Z Tóth, 'Identifying Gaps between the Legislative Tools of Soil Protection in the EU Member States for Common European Soil Protection Legislation' (2018) Sustainability 2886.

<sup>27</sup> For a brief discussion on this point see S Affolter, 'The Subsidiarity Principle in EU Environmental Law' in G Walzenbach and R Alleweldt (eds) *Varieties of European Subsidiarity. A Multidisciplinary Approach* (E-International Relations Publishing 2021) 79.

In this context, the Commission is conceivably concerned with avoiding another defeat, but the overall pressing scenario and the increased awareness of the urgency of more effective coordinated EU environmental policies amount to decisive factors which will probably ensure that the Guardian of the Treaties wins the game with ease. From a legal viewpoint, while these events remind EU lawyers of the tricky political nature of the principle of subsidiarity,<sup>28</sup> the enhanced proceduralisation of this principle introduced by the Lisbon Treaty could be another source of support for the Commission. As is known, in addition to the pending consultations and impact assessment, Protocol no. 2 requires the Commission to submit its legislative proposal to the national parliaments, precisely with a view to performing an *ex ante* subsidiarity-oriented political check. A positive evaluation of the proposal by the national assemblies and the general public's increased awareness of the need for action to tackle climate change could be conclusive political incentives which prevent the governments sitting in the Council from demonstrating strong opposition to the Soil Health Directive, possibly even urging them to take a proactive approach to the negotiations in a similar manner to the Commission.

The latter scenario clearly depicts the best option, as the current trends of EU environmental policy and the available scientific evidence demonstrate that the time has come for an EU Soil Framework Directive.

<sup>28</sup> See *inter alia* D Wyatt, 'Subsidiarity. Is It too Vague to Be Effective as a Legal Principle?' in K Nicolaidis and S Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press 2003) 86; B Bertrand, 'Un principe politique saisi par le droit. La justiciabilité du principe de subsidiarité en droit de l'Union européenne' (2012) *Revue Trimestrielle de Droit Européen* 329.