

# COVID-19, Climate Change Action and the Road to Green Recovery

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Can there be a silver lining to a pandemic? Lockdown, a common response to COVID-19 by governments across the world, dramatically changed peoples' lives by confining their movement to their homes. It thus also changed our transportation and consumption patterns, leading to huge reductions in emissions.<sup>1</sup> Images snapped by NASA and the European Space Agency showing clouds of nitrogen dioxide disappearing over China following its quarantine measures gave hope that on the other side of the pandemic, a cleaner climate awaits.<sup>2</sup>

Efforts to minimise the spread of COVID-19 have many commonalities with attempts at tackling other large and volatile problems, such as climate change. After all, both are classic examples of a collective problem that is cross-jurisdictional, poly-centric and with devastating non-linear outcomes.<sup>3</sup> The current pandemic brings to the fore just how much governments, and leadership anchored in science, matter.<sup>4</sup> Similarly, being able to coordinate state responses and scientific expertise on a global scale is crucial, which is why umbrella organisations like the World Health Organisation are, as Angela Merkel quipped, 'a good thing'.<sup>5</sup> This echoes some of the credit the UNFCCC has received for its coordinating efforts on climate change.<sup>6</sup> All of this is to say that like COVID-19, climate change demands individual and collective behavioural adjustments—but the time scale differs. The need to fight climate change stretches over years and decades, making action seem less urgent compared

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- 1 Corinne Le Quéré and others, 'Temporary Reduction in Daily Global CO<sub>2</sub> Emissions During the COVID-19 Forced Confinement' (2020) 10 *Nature Climate Change* 647.
- 2 See the Earth Observatory <<https://earthobservatory.nasa.gov/images/146362/airborne-nitrogen-dioxide-plummets-over-china>> accessed 20 September 2020.
- 3 See Liz Fisher, 'Thinking Collectively: Law and Scholarship in Precarious Times' (2020) 32 *JEL* (this issue).
- 4 Saskia Miller, 'The Secret to Germany's COVID-19 Success: Angela Merkel Is a Scientist' *The Atlantic* (20 April 2020).
- 5 As quoted in James Meek, 'The Health Transformation Army' *London Review of Books* (2 July 2020) 11.
- 6 Jonathan Kuyper, Heike Schorder and Björn-Ola Linnér, 'The Evolution of the UNFCCC' (2018) 43 *Annual Review of Environment and Resources* 343.

to what is required for in dealing with a global pandemic.<sup>7</sup> Nonetheless, COVID-19, as Rhiannon Ogden-Jones writes, ‘has woken up states’ to environmental problems,<sup>8</sup> and revived governments’ and organisations’ commitments to dealing with climate change.

These are overwhelmingly expressed as economic stimulus and rescue packages that promise a ‘green recovery’. In the UK, Prime Minister Boris Johnson has announced that £350 million will be made available to cut emissions in heavy industry, construction, space and transport, and in this way ‘drive economic recovery from coronavirus’ whilst meeting the government’s ‘goal of leading the most ambitious environmental programme worldwide’.<sup>9</sup> The International Monetary Fund has made similar pleas for an environmentally conscious stimulus as a way to ‘ensure a sustainable recovery’,<sup>10</sup> and the European Commission has put forward a comprehensive rescue package for COVID-stricken European economies geared towards delivering ‘a more sustainable, resilient and fairer Europe for the next generation’<sup>11</sup>—a proposal subsequently adopted by the Council.<sup>12</sup> As an important pillar of the rescue package stands the ‘European Green Deal’—a plan introduced before the pandemic, but later brought forward to help deal with the COVID economic crisis, promising to make the European Union (EU)’s economy ‘resource efficient and competitive’ and climate neutral by 2050.<sup>13</sup> To ensure that this does not remain mere political jargon, the Commission has proposed a European Climate Law<sup>14</sup> which would turn ‘this political commitment into a legal obligation’.<sup>15</sup>

This is not the first time that an economic crisis has reinvigorated climate action in the form of ‘green recovery’. President Barack Obama, for example, responded to the global financial crisis in 2009 by rallying support for the New Green Deal, sought to

- 7 Chloe Jordan and Abraham Palmer, ‘Editorial – Virtual Meetings: A Critical Step to Address Climate Change’ (2020) 6 *Sciences Advances* (forthcoming).
- 8 Rhiannon Ogden-Jones, ‘Recover Better: An Intersectional View of Civil and Environmental Needs’ (2020) 32 *JEL* (this issue).
- 9 UK Government, Press release: PM Commits £350 Million to Fuel Green Recovery, <<https://www.gov.uk/government/news/pm-commits-350-million-to-fuel-green-recovery>> accessed 20 September 2020. Other political leaders have made similar claims, including, for example, Emmanuel Macron, see Audrey Garric, ‘Plan de reliance: 20 milliards d’euros pour la transition écologique’ *Le Monde* (Paris 16 July 2020).
- 10 IMF, ‘Climate Change – Green Recovery’ <<https://www.imf.org/en/Topics/climate-change/green-recovery>> accessed 20 September 2020.
- 11 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 on ‘Europe’s Moment: Repair and Prepare for the Next Generation’ COM (2020) 456 final, 2.
- 12 European Council, Special meeting of the European Council – Conclusions (Brussels, 21 July 2020) CONCL 4.
- 13 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 on ‘The European Green Deal’ (COM) 2019 640 final, 2. See also Frans Timmermans, ‘Speech on the European Green Deal as a Growth Strategy at the Bruegel Annual Meetings’ (Brussels, 1 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1551](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1551)> accessed 20 September 2020.
- 14 ‘Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending (EU) 2018/1999 (European Climate Law)’ COM (2020) 80 final.
- 15 The European Commission, ‘A European Green Deal’ <[https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en)> accessed 20 September 2020.

create ‘green job growth’ and curb climate change by shifting the US economy away from fossil fuels.<sup>16</sup> The slogans are difficult to disagree with—the EU Green Deal, for example, promises economic growth, zero net emissions of greenhouse gases, and insists that ‘no person and no place is left behind’.<sup>17</sup> For a problem like climate change, which is known to create winners and losers,<sup>18</sup> this is certainly a good sell. Why, then, should the green recovery rhetoric make environmental law scholars uneasy?

To start with, the framing of the European Green Deal as ‘a new growth strategy’<sup>19</sup> is problematic. Obviously, public debt in the wake of the pandemic is a major concern,<sup>20</sup> but how exactly does environmental protection feature in the debate about the looming economic crises? Economists have pointed out that a key commonality between COVID-19 and climate change is that they are both externalities, market failures that require state intervention in the form of fiscal stimuli.<sup>21</sup> From this view, any recovery plan is about ‘fixing’ the market. This sounds straightforward enough in the abstract, but what does it mean concretely? Does ‘recovery’ entail rescuing the petrochemical industry—which is at risk of becoming a stranded asset on the road to a low-carbon economy<sup>22</sup>—just as the banking sector was in the 2008 crisis? Can we expect more frequent exemptions from state aid rules to the aviation and maritime industry, which are under continued strains of the pandemic?<sup>23</sup> And what about fossil fuel subsidies to fishery and farming? These are sectors that often support small and remote communities—how should that be weighed against their damaging impact on the environment? What about socio-economically vulnerable individuals—should they be exempted from environmental measures that may further cripple their finances? The *gilets jaunes* protests are a powerful reminder of just how difficult so-called ‘market fixes’ can be, and the European Commission—in insisting on a ‘just and inclusive’<sup>24</sup> transition—seems to be tuned into these dangers. The generic ‘growth’ rhetoric, however, does little to explain who will inevitably have to make painful, even if fair, adjustments, and on what grounds.

The European Commission is a bit more informative on the possible role that environmental law might play in transforming the EU into a ‘prosperous society . . . where economic growth is decoupled from resource use’.<sup>25</sup> The EU will use its emissions trading scheme (ETS)—a key measure in its climate legislative package—to

16 For an overview, see Timothy Luke, ‘A Green New Deal: Why Green, How New, and What Is the Deal?’ (2009) 3 *Critical Policy Studies* 14.

17 The European Commission (n 15). Similar pledge ensuring that ‘No person, no region, no Member State should be left behind’ is made in ‘Europe’s Moment’ (n 11) 1.

18 Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2018) 99.

19 Communication on ‘The European Green Deal’ (n 13) 2.

20 See, eg Christina Figueres and Benjamin Zycher, ‘Can We Tackle Both Climate Change and Covid-19 Recovery?’ *Financial Times* (London 7 May 2020). See also Timmermanns (n 13).

21 Cameron Hepburn and others, ‘Will Covid-19 Fiscal Recovery Packages Accelerate or Retard Progress on Climate Change?’ (2020) *Oxford Review of Economic Policy* (forthcoming).

22 See, eg Steven Felt and Carroll Muffett, *Pandemic Crisis, Systemic Decline: Why Exploiting the COVID-19 Crisis Will Not Save the Oil, Gas, and Plastic Industry* (The Center for International Environmental Law 2020).

23 For an overview of the many state aid exemptions during the COVID-19 pandemic, see <[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html)> accessed 21 September 2020.

24 Communication on ‘The European Green Deal’ (n 13) 2.

25 *ibid.*

fund part of the proposed €750 billion recovery plan by extending the scheme's scope and making good use of revenues from the auctioning of emission allowances.<sup>26</sup> Looking back at the history of the EU ETS, this may seem an appropriate role for this particular regulatory system to play. After all, it was introduced into the EU legal order with the promise of advancing the EU's position in 'a global race for green growth and jobs' and securing a 'win-win' regulatory scenario where environmental law helps stimulate the economy.<sup>27</sup> Once the ETS was established, however, judicial battles over its purpose ensued. Was it primarily an environmental mechanism, aimed to reduce greenhouse gas emissions? Or was it principally an economic stimulus, dependent on high carbon prices for its sustainability? Deciding between the two interpretations had consequences for how the mechanism was constructed and managed, and how well it aligned with the EU's constitutional setting.<sup>28</sup> Helping to kick-start the EU's climate-neutral economy may be a valid ambition for the EU ETS, but that ambition alone does not free it from legal demands involved in running the trading scheme in line with EU law.

This is all to say that law matters in how we decide to construct markets to generate growth. In fact, the more telling story of Europe's green recovery is not one about externalities and investment plans but about climate targets. The overall objective is for the EU to be climate neutral by 2050.<sup>29</sup> This is supposed to be achieved by a mix of direct targets (a minimum 55% reduction of net greenhouse gas emissions by 2030) and indirect ones (eg decarbonising the energy sector, investing in private and public transport). As Chris Hilson explains, climate targets, although straightforward in projecting the desired end result, need to be categorised within a complex taxonomy, specifying whether the targets are inclusive or non-inclusive; net or absolute; set with a baseline, fixed level or intensity-based; binding or non-binding; short term or long term; and ambitious or unambitious.<sup>30</sup> Targets, in other words, raise complex legal questions, some of which have been litigated.

The EU's climate targets and policies outlined in the 2030 Climate and Energy Policy Framework were challenged before the General Court for not being ambitious enough by a group of minors, accompanied by their parents, as well as a youth organisation.<sup>31</sup> The EU court dismissed the action due to a lack of standing.<sup>32</sup> This certainly adds to the ever-increasing pressure on the EU judiciary to rethink its application of standing rules for individuals, and access to court at the EU level. Rethinking public participation, more broadly, has also been one of Climate

26 'Europe's Moment' (n 11) 4. Legislative proposals on this are still to follow.

27 Sanja Bogojević, *Emissions Trading Scheme: Markets, State and Law* (Hart 2013) 107.

28 Sanja Bogojević, 'Trading Schemes' in Emma Lees and Jorge Vinuales (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019) 926–48.

29 'Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending (EU) 2018/1999 (European Climate Law)' COM (2020) 80 final, art 1.

30 Chris Hilson, 'Hitting the Target?' *Analysing the Use of Targets in Climate Law* (2020) 32 JEL 195.

31 Case T-330/18, *Carvalho and others v European Parliament and Council* (2019) ECLI:EU:T:2019:324 (on appeal).

32 For a discussion see Sanja Bogojević, 'Human Rights of Minors and Future Generations: Global Trends and EU Environmental Law Particularities' (2020) 29 RECIEL 191.

Rebellion's demands.<sup>33</sup> It is therefore interesting to see Article 8 on 'public participation' included in the proposed European Climate Law,<sup>34</sup> outlining that the objectives of the law—to achieve climate neutrality by 2050—will be carried out through an 'inclusive and accessible' dialogue at national, regional and local levels, in concert with 'social partners, citizens and civil society, for the exchange of best practice'. In addition, the European Commission is set to launch a so-called 'European Climate Pact' to give 'everyone a voice and space to design new climate actions, share information, launch grassroots activities and showcase solutions that others can follow'.<sup>35</sup> This is significant. The European Green Plan has the potential of overhauling not only the economy but EU governance more generally. The narrow focus on 'growth' is therefore unfortunate, if not misplaced.

As the environmental benefits that lockdown produced 'evaporate as world reopens',<sup>36</sup> it is important to think carefully about how to shape economic recovery. Clearly, this will not be a quick 'market fix'—difficult choices lie ahead, particularly as the European Commission has proposed to take an ambitious path. Let us indeed hope for green recovery. But in pursuing it, let us not be misled by grand slogans, but focus on the law.

33 XR's demands for a citizens' assembly <<https://xrcitizensassembly.uk/uk-climate-assembly/>> accessed 20 September 2020.

34 European Climate Law (n 29).

35 European Climate Pact <[https://ec.europa.eu/clima/policies/eu-climate-action/pact\\_en](https://ec.europa.eu/clima/policies/eu-climate-action/pact_en)> accessed 20 September 2020.

36 Sarah McFarlane, 'Covid-19's Environmental Benefits Evaporate as World Reopens' *The Wall Street Journal* (NYC 9 July 2020).