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THE EUROPEAN UNION ACTION ON SINGLE-USE PLASTICS: A FIRST ASSESSMENT

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I. Introduction

Plastics have been recently defined as a ‘global health crisis’.¹ How did one of the most revolutionary discovery in human history turn into a global threat? Plastics identifies a category of materials called polymers, which are produced using natural substances like cellulose or carbon atoms deriving from petroleum and other fossil fuels.² The discovery of plastics dates back to the end of the 19. Century, when the first synthetic polymer was invented in 1869 by John Wesley Hyatt. In the 20. century, plastic has been associated to modernity, the ‘shining surfaces’ in the (full of gender stereotypes) US and European advertisements of the 50s depicting a ‘plastic future.’³ In the last decades, however, the use of plastics in basically all aspects of our lives — from food to transport, from communication to personal hygiene — and the lower cost of plastics compared to other products have led to a sort of ’abuse’ of plastics, more than what nature could absorb. It has been argued that plastic and its transformation over time represent both ‘the delight of consumption and the fear of its environmental

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consequences.\(^4\) As it was empirically proved, high-income countries produce more plastic waste per person, even though these same countries might have a much more developed recycling system.\(^5\) Plastic pollution has been having a negative impact on oceans and wildlife health, and we are not fully aware, at the current stage of scientific knowledge, of the possible impact of micro-plastics on human health. Furthermore, a report commissioned by the European Union (EU) proved that plastic poses distinct risks to human health at every stage of the production, the use and the management of plastic waste.\(^6\) Images of plastics in the ocean and of fish full of plastics and microplastics have become viral. What is the legal action that can be undertaken in order to reduce the phenomenon? The first complete answer to this problem at the international level has come from the EU with regard to a specific type of plastics, the one that is used once or for a very short period of time.

Against this backdrop, this paper is aimed at providing a legal analysis of the European Strategy for Plastics, adopted by the European Commission in January 2018,\(^7\) and of the Directive No.2019/904 on the reduction of the impact of certain plastic products on the environment, also known as 'Single-Use Plastics Directive', which was adopted on 5 June 2019 and published one week later.\(^8\) The main argument of this article is that, despite the important achievements of this Directive adopted at its first reading by the European Parliament and the Council of the EU, which I will summarise in the five “Rs” — reduction, restrictions, requirements, responsibility, recycling — this legal instrument does not grasp the complexity of the evolving debate on the human right to a decent/healthy environment and on the rights of nature. To this end, this article will explain the process that led to the adoption of the Single-Use Plastics Directive, which marks an unprecedented step in the attempt to reduce plastic pollution in the environment, especially seas and oceans, at the international level. It could be used as a model for national and regional legislation alike and can spur the debate within the international community. I contend however that the EU approach to the regulation of plastics is exclusively anthropocentric, whereas eco-centric, nature-centred considerations would have better caught the complexity of the debate.

II. From the Strategy to the Proposal: The European Commission’s Economic Approach

In January 2018, the European Commission published a communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'A European Strategy for Plastics in a Circular Economy.' The European Commission locates the issue of plastics within the larger debate on the circular economy, acknowledging that ‘there is an urgent need to tackle the environmental problems that today

\(^4\) Ibid, p.287.
\(^6\) Plastic & Health, cit.
\(^7\) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Strategy for Plastics in a Circular Economy {SWD(2018) 16 final}.
cast a long shadow over the production, use and consumption of plastics,‘ and that ‘the million tonnes of plastic litter that end up in the oceans every year are one of their most visible and alarming signs of these problems, causing growing public concern.’ The aim of the Strategy can be understood from the point of view of the internal market. The European Commission refers to a ‘new plastics economy’, where ‘the design and production of plastics and plastic products fully respect reuse, repair and recycling needs and more sustainable materials are developed and promoted,’ in order to pursue an Energy Union and to make a tangible contribution to the 2030 Sustainable Development Goals. Hence, no change of perspective can be appreciated in the approach of the European Union: plastics are needed in the economic system and therefore what we can do is to reduce and to recycle. This might sound like a very practical approach, but what about the precautionary principle enshrined in the founding treaties of the EU? What about considering the protection of the environment and its flora and fauna? Scant references are made to the environment, whereas the precautionary principle does not even enter the text of the Communication.

As for the data, the European Commission pointed out that around 25.8 million tonnes of plastic waste are generated in Europe every year, of which less than 30% is collected for recycling. 150,000 to 500,000 tonnes of plastic waste enter the oceans every year and end up in some particularly vulnerable areas, such as the Mediterranean Sea or the Arctic Ocean. Between 75,000 and 300,000 tonnes of microplastics, which are tiny pieces of plastics, are estimated to be released in the EU every year. Given the nature of these small fragments, it is difficult to measure the impact they might have on humans, non-humans and on the environment in general. The European Commission referred in the text to the Marine Strategy Framework Directive and the Plastic Bags Directive it already adopted in 2008 and 2015 respectively, and to the Drinking Water Directive to promote access to tap water in order to elaborate what it called ‘A vision for Europe’s new plastics economy.’ This plastic economy consists in ‘a smart, innovative and sustainable plastics industry, where design and production fully respects the needs of reuse, repair, and recycling, brings growth and jobs to Europe and helps cut EU’s greenhouse gas emissions and dependence on imported fossil fuels.’ The objective to be reached by 2030 is threefold: first, the elimination of single-use plastic products, which entails changes in the production and in the design to make all plastic packaging either reusable or recycled in a cost-effective manner; second, the recycling of more than half of plastics waste generated in Europe; third, an increasing sorting and recycling capacity with the creation of new jobs in Europe. The entire strategy focused on the markets: a market for

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10 Ibid.
11 Similar concern in the comment by E. Kentin, available here https://leidenlawblog.nl/articles/recycling-as-panacea-for-plastic-pollution-the-eu-plastics-strategy
12 (2018) 16 Final, p.3.
innovation related to the production of plastics and markets for recycled and renewable plastics. The emphasis on markets should not be blamed *per se*. It is clear that in order to spur enterprises to invest and work on innovation it is necessary to highlight the economic benefits of the entire operation. It also does not come as a surprise that the European Commission has decided to work on a more economic aspect. Its approach to the issue of access to water as a consequence of the European Citizens’ Initiative corroborates this trend. Nonetheless, as I will elaborate further, the Strategy is not capable of spurring a new approach to the issue, by posing environmental and human rights concerns at its centre, and by considering the environment as a public interest. The word ‘rights’ is completely absent from the Strategy, indeed. Furthermore, the focus has been on reducing what humans can ‘see’, namely the waste in the oceans, but what about the effects of plastics on biodiversity, including both flora and fauna?

Few months after the Strategy, the European Commission presented its proposal for a new Directive on the reduction of the impact of certain plastic products on the environment, known as Single-Use Plastics Directive, which draws on the Strategy and converts commitments into legal provisions. The legal basis of the instrument consists in Article 192(1) of the Treaty of the Functioning of the European Union (TFEU). This provision constitutes the general legal basis for the adoption of environmental measures and empowers the EU to act both within and outside its borders. In the preamble, the proposal acknowledges that ‘plastics is increasingly ubiquitous in everyday life.’ The market-oriented approach clearly emerges in Article 1 of the proposal, which states that:

> The objective of this Directive is to prevent and reduce the impact of certain plastic products on the environment, in particular the aquatic environment, and on human health as well as to promote the transition to a circular economy with innovative business models, products and materials, thus also contributing to the efficient functioning of the internal market.

Despite this quite general scope, the main objective of the Directive, however, as clearly set by the Commission in the explanatory memorandum to the Directive, is to address marine litter: ‘Due to its persistency, the impacts of plastic litter are growing as each year more plastic waste accumulates in the oceans.’ The Directive, which was found as the most appropriate legal instrument in light of the principles of subsidiarity and proportionality, was conceived to complement existing actions and legislation. Furthermore, the Commission stressed that the Strategy for Plastics already enshrines specific measures on microplastics, which constitute an important share of marine plastic litter, for example by addressing fishing gear. However, as it will be discussed in the next paragraph, the Directive, in the final text adopted by the

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17 Ibid.
18 See, in that respect, the language used by the Commission in the Communication on the right to water COM(2014) 177 final (p.3): ‘Certain rights and principles set out in the Charter of Fundamental Rights of the EU can be interpreted as also being of direct relevance for *access* to safe drinking water and improved sanitation. Effective protection of fundamental rights, like the right to dignity (Article 1) or the right to life (Article 2), is clearly affected by the lack of *access* to safe drinking water and sanitation.’
20 Proposal, preamble, recital No.1.
21 Ibid.
Parliament and the Council, clearly excludes its application to microplastics. The analysis conducted by the European Commission on the typology of plastics led to the identification of three different categories of items: a) those for which there are sustainable alternatives; b) those for which alternatives do not exist and for which it is possible to limit damages by informing consumers and making producers financially responsible; c) those for which it is necessary to make sure that items falling in this category end in a separate collection and recycling circuit. The scheme that was chosen by the European Commission can be summarised in 5 Rs: Reduction, Restrictions, Requirements, Responsibility, Recycling, on which I will discuss further while analysing the content of the Directive. Finally, the Commission found that the proposal ‘has no consequences for the protection of fundamental rights’: this affirmation sounds at least unusual considering the impact the regulatory measures regarding plastics might have on the human right to health, and confirms an approach by the Commission that is more market- than human rights-oriented. Yet, the proposal referred at its Article 12 to access to justice, an aspect that was not kept in the final version of the act as adopted by the Parliament and the Council.

III. The Content of the Directive with a Focus on the 5 ‘Rs’

The Directive was approved during the first reading by both the European Parliament and the Council. The Council approved it by unanimity with the only abstention of Hungary. In the preamble, it is recalled that single-use plastic products and fishing gear containing plastic are ‘a particularly serious problem in the context of marine litter and pose a severe risk to marine ecosystems, biodiversity and, to human health and are damaging activities such as tourism, fisheries and shipping.’ This is the closest reference we can find in the Directive to human rights concerns related to the pollution of the environment through plastics. The Directive does not reproduce the adverb “potentially” which was included in the European Commission’s proposal and could be considered expression of the precautionary principle. The preamble also acknowledges that ‘marine litter is transboundary in nature and is recognised as a growing global problem,’ and that the legal instrument locates into the more general debate on circular economy. The Directive clearly responds to a necessity, which consists in the reduction of single-use plastics found on beaches in the Union:

To focus efforts where they are most needed, this Directive should cover only those single-use plastic products that are found the most on beaches in the Union as well as fishing gear containing plastic and products made from oxo-degradable plastic. The single-use plastic products covered by measures under this Directive are estimated to represent around 86% of the single-use plastics found, in counts, on beaches in the Union. Glass and metal beverage containers should not be covered by this Directive as they are not among the single-use plastic products that are found the most on beaches in the Union.

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24 Ivi, recital No.3.
25 Ivi, recital No.7.
Hence, the Directive excludes glass and metal beverage containers from its scope of application, as well as microplastics, with regard to which the Union ‘should encourage all producers to strictly limit [them] in their formulations.’ Article 3 of the Directive defines ‘plastic’ as ‘a material consisting of a polymer [...] to which additives or other substances may have been added, and which can function as a main structural component of final products, with the exception of natural polymers that have not been chemically modified,’ and, most significantly, ‘single-use plastic product’, which means ‘a product that is made wholly or partly from plastic and that is not conceived, designed or placed on the market to accomplish, within its life span, multiple trips or rotations by being returned to a producer for refill or re-used for the same purpose for which it was conceived.’

In order to better systematise the provisions of the Directive, I will investigate its content using a classification of the envisaged measures along 5 Rs: Reduction, Restrictions, Requirements, Responsibility, Recycling.

a) Reduction (Article 4). Member States are obliged to take ‘the necessary measures to achieve an ambitious and sustained reduction in the consumption of the single-use plastic products listed in Part A of the Annex,’ namely: cups for beverages, including their covers and lids; and food containers, such as boxes, with or without a cover, used to contain food which is ready for immediate consumption without any further preparation, and take away. Leaving room to the States on which measures are most suitable for the envisaged purpose, the Directive requires the State to provide a description of the measures they have adopted by 3. July 2021, and gives some examples, including the availability of re-usable alternatives to the single-use plastic products at the point of sale to the final consumer. This provision also enables the Commission to adopt an implementing act, laying down the methodology for the calculation and verification of the reduction in the consumption of the single-use plastic products listed in Part A of the Annex.

b) Restrictions (Article 5). This provision obliges States to prohibit the single-use plastic products listed in Part B of the Annex (cotton bud sticks, cutlery, plates, straws, beverage stirrers, sticks to be attached to and to support balloons, along with food containers, cups and beverage containers made of expanded polystyrene) and of products made from oxo-degradable plastic. The latter includes materials that, due to some additives, can be reduced to micro-fragments or to chemical decomposition as a consequence of oxidation.

c) Requirements (Articles 6 and 7). Requirements may refer to the product or to the marking. As for the former, Member States have an obligation to ‘ensure that single-use plastic products listed in Part C of the Annex that have caps and lids made of plastic may be placed on the market only if the caps and lids remain attached to the containers during the products’ intended use stage.’ It includes beverage containers with a capacity of up to three litres, such as beverage bottles and composite beverage packaging. It does not apply to beverage containers intended and used for food for special medical purposes. This goal can be better achieved through standards to be elaborated by European standardisation organisations, which will be invited by the Commission to proceed in this direction. With regard to beverage bottles with a capacity of up to three litres, Member States shall ensure that from 2025 the bottles are

26 Ivi, recital No.8.
manufactured with at least 25 per cent of recycled plastic, and from 2030, with at least 30 per cent of recycled plastic. By 1 January 2022, the Commission will adopt implementing acts laying down the rules for the calculation and verification of the targets. As for marking, Member States are required to ensure that single-use plastic product in Part D of the Annex (sanitary towels (pads), tampons and tampon applicators; wet wipes, i.e. pre-wetted personal care and domestic wipes; tobacco products with filters and filters marketed for use in combination with tobacco products; cups for beverages) provide a ‘conspicuous, clearly legible and indelible marking on its packaging or on the product itself’ with the purpose of informing the consumers on the waste management options, on the presence of plastics in the product and of the negative impact of inappropriate waste disposal of the product in the environment. It is within the competence of the Commission, through an implementing act, to establish the harmonised marking to be used.

d) Responsibility (Article 8). The Directive requires States to ensure the establishment of producer responsibility schemes for the following single-use plastic products: food containers used to contain food for immediate consumption or take-away; packets and wrappers made of flexible material containing food; beverage containers with a capacity of up to three litres; cups for beverage, including their covers and lids; lightweight plastic carrier bags. Producers will bear the costs of awareness raising measures, of waste collection in public collection systems, of cleaning up litter deriving from these products, the transport, and the treatment. With regard to wet wipes, balloons not for professional uses and tobacco products, Member States must ensure that the producers also bear the costs of data gathering and reporting in accordance with point (c) of Article 8a(1) of Directive 2008/98/EC as amended in 2018 (a reporting system must be in place ‘to gather data on the products placed on the market of the Member State by the producers of products subject to extended producer responsibility and data on the collection and treatment of waste resulting from those products specifying, where appropriate, the waste material flows’). Concerning tobacco products, the Directive is particularly stringent, and suggests that the costs of waste collection might include the setting up of specific infrastructure, ‘such as appropriate waste receptacles in common litter hotspots’ (para. 3). At its paragraph 4, the provision ‘protects’ the producers, requiring that the costs envisaged do not exceed the costs that are necessary to provide the services in a cost-efficient way and are decided in a transparent way between the actors concerned. Two paragraphs are devoted to transnational businesses. According to the provision, each Member State must allow producers established in another Member State and operating on its market, and established on its territory and operating in another Member State’s market, to appoint an authorised representative to fulfil the obligations of a producer related to extended producer responsibility schemes on its territory or in the other Member State’s territory. The extended producer responsibility schemes must expand to fishing gear containing plastics and must ensure that the producers of these products bear the costs of the separate collection of waste fishing gear containing plastic, and the cost of the activity of awareness raising. Finally, the Commission is requested to encourage the European standardisation organisations to develop ‘harmonised standards relating to the circular design of fishing gear to encourage preparing for re-use and facilitate recyclability at end of

life. As it is known, extended producer responsibility can be defined as ‘an environmental policy approach in which a producer’s responsibility for a product is extended to the post-consumer stage of a product’s life cycle.’ This concept, originally applied in Germany, implies a shift of responsibility for managing waste from the local governments and the consumers to the private industry. It was completely endorsed by the Organisation for the economic cooperation and development (OECD) and by the European Union, which adopted a first Directive on packaging and packaging waste including this principle in 1994. It also constitutes one of the pillars of Directive No.2008/98.

c) Recycling (Article 9). Recycling is ensured through separate collection. The timeline is the following: by 2025, Member States must ensure the separate collection of an amount of beverage bottles with a capacity of up to three litres equal to 77 per cent of the same single-use plastic products placed on the market in a given year by weight; and by 2029, of an amount equal to 90 per cent. Some measures are recommended to Member States, including deposit-refund schemes, and the establishment of separate collection targets for relevant extended producer responsibility schemes. An implementing act by the Commission is also required to verify the separate collection targets. Furthermore, the Commission is asked to ensure the exchange of information and sharing of best practices among Member States.

It is interesting to note that the Directive also aims at raising awareness of the impact of plastics in the oceans and in the environment more generally. Article 10 provides that Member States shall take measures ‘to inform consumers and to incentivise responsible consumer behaviour, in order to reduce litter from products covered by this Directive, and shall take measures to inform consumers of the single-use plastic products listed in Part G of the Annex (all the products mentioned in the aforesaid measures) and users of fishing gear containing plastic’ about the availability of re-usable alternatives and re-use systems and waste management options; the impact of littering and other inappropriate waste disposal of single-use plastic products and of fishing gear in the environment, especially the marine one, and on the sewer network.

The implementation of the Directive in the Member States is subject to several guidelines to be published by the European Commission, for example with regard to what is a single-use plastic product (Article 12). Member States are also obliged to align with a strict system of reporting, which must lead to the adoption of a comprehensive report by the Commission (Article 13). The reporting system is also based on several implementing acts by the European Commission. Penalties connected to the infringement of national provisions transposing the Directive are decided by the Member States, but they must be effective, proportionate and dissuasive (Article 14). The Commission will evaluate the Directive and its impact by July 2027. The deadline for the transposition of the Directive into national legislation is 3 July 2021 (Article 17).

29 This notion is also known in Japan. H. Yamakawa, The packaging recycling act: The application of EPR to packaging policies in Japan (OECD, 2014), available at www.oecd.org/env/waste/gfenv-extendedproducerresponsibility-june2014.htm
Chapter 4: First Observations on The Directive: The Missed Opportunity to Go beyond an Anthropocentric Approach

The Directive must be surely welcomed, since it is at the forefront at the international level with regard to the management of plastic waste, and to the reduction (in some cases even the elimination) of single-use plastic products. This article will investigate first the potential of the Directive, and then two main weaknesses: the missing human rights (including the human right to a decent environment)-based approach and the anthropocentric view of the environment endorsed by the European Union; the lack of reference to the precautionary principle.

1. The Potential Impact of the Directive

The Directive has a huge legislative and practical potential. The impact of this Directive on the evolution of environmental law, especially at domestic or regional level, might be remarkable in the years to come. It can inspire new legislation, spur governments to cooperate in the management of plastic waste and adopt more comprehensive legal instruments at the international level, it might also encourage the adoption of standards and guidelines to be applied by producers operating worldwide. It might also contribute to the consolidation of the reduction of plastic as a public interest at the international level. Furthermore, the European Union might introduce discussions on the reduction of plastics in the negotiation process of forthcoming free trade agreements with third countries and encourage the amendment of agreements in force. Japan, for example, might be interested in aligning its environmental policy with the European strategy for plastics, also in order to support its exports towards the European Union which constitute the core of the EU-Japan economic partnership agreement, in force as of 1 February 2019. Even though the implementation of the Directive entails some costs for the producers, as the Strategy has highlighted, this does not preclude the evolution of technology and research. Quite to the contrary, it promotes new business activities, aimed, for example, at designing sustainable packaging, at doing research on how to make products with a reduced amount of plastic in them, and at building infrastructures for the management of plastic waste.


In exploring the main weakness of the Directive, the analysis will concentrate on one main argument, the fact that the European Union was not capable of advancing its environmental governance to the point of overcoming the limited anthropocentric approach of its legislation. As I explained, the European Commission, along with the Parliament and the Council, chose an

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approach to plastics which has been led since the very beginning by economic considerations, and aimed at promoting circular economy. This purpose, I have anticipated, is not devoid of interest and could well encourage the producers to even anticipate the national implementing measures in order to meet the concerns of their consumers. Nonetheless, what it seems to emerge is that the European Union, and in particular the Commission, was not courageous enough to take a step forward in the protection of the environment and in embracing environmental and human rights law in its legal instrument. I will explore in detail what I mean with this affirmation.

First, the Directive does not refer to human rights. In the preamble and in Article 1, the Directive contradicts, to a certain extent, its innovative environmental vision, by only mentioning the impact of plastics on ‘human health.’ It should be stressed that the language used is precisely ‘health’ and not ‘human right to health,’ which is far from being a mere technicality. Health is a status, whereas a right can be invoked by individuals in front of courts. It is interesting to note that in the proposal presented by the European Commission, there was a reference to access to justice. According to Article 12 of the proposal:

Member States shall ensure that natural or legal persons or their associations, organisations or groups, in accordance with national legislation or practice, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, actions or omissions related to the implementation of Articles 5, 6, 7 and 8 when one of the following conditions is fulfilled:

(a) they have a sufficient interest;
(b) they maintain the impairment of a right, where the administrative procedural law of the relevant Member State requires this as a precondition.

This article, as explained by the Commission, was aimed at ‘implement [ing] the Aarhus Convention’ with regard to access to justice and [wa]s in line with Article 47 of the Charter of Fundamental Rights. Despite the reluctance showed by the Commission with regard to the use of the word ‘right’, this provision could have partially responded to my criticism on the lack of a human rights-based approach of the Single-Use Plastics Directive. Even though the obligations encompassed in the Convention are procedural in nature, Aarhus-style procedural rights have been incorporated into general human rights law, strengthening the importance of public participation in sustainable development. The lack of a human rights-based approach is quite striking. The jurisprudence of regional and national courts has frequently applied human rights norms to environmental issues. Judgments of the European Court of Human Rights, within the system of the Council of Europe, have, for example, contributed to the evolution of an environment-oriented human rights jurisprudence. The jurisprudence of the European Court

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34 The reference to ‘access to water’ in the documents of the Commission instead of the use of the word ‘rights’ is an example.

of Human Rights, but also of other regional and national courts, has shown how human rights can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information [...] governments additionally have a positive duty to take appropriate action to secure these rights. Despite the absence of a right to a decent environment in the European Convention on Human Rights, Strasbourg judges have dealt with environmental concerns by applying some norms of the Convention, such as Article 8 (right to respect for private and family life). Strictly connected to my reflection on human rights is the inchoate human right to a healthy (decent) environment, whose evolution is not thus straightforward at the current stage of state practice. One might ask what goal the affirmation of a right to a decent environment would pursue. Outstanding authors have commented on the possibility of conceptualizing a right to a decent environment and of locating it within the corpus of economic, social, and cultural rights. According to Boyle, ‘clarifying the existence of such a right would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development,’ and ‘the further elaboration of procedural rights [...] would facilitate the implementation of such a right.’ Boyle further argued that ‘a right to a decent environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights, a catalogue which for good reasons there is great reluctance to expand.’ The affirmation of the right to a decent environment would entail a renewed role for the European Strategy for Plastics and the Directive on Single-Use Plastics. Even if the Directive acknowledges the impact of plastics on human health and the environment, the solution envisaged by the European Union is based on purely (legitimate but should not be exclusive) economic considerations. Why not emphasising — at least in the preamble — that the Directive contributes to the realisation of the right to a decent environment? Or, as a minimum, the Directive could have recalled one of the provisions of the Charter of Fundamental Rights of the European Union, which, although timidly, stresses the importance of the protection of the environment. Article 37 of the Charter states that: ‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.’

One further comment is needed here, even though it seems quite premature at the European level. The reduction of — to the point of even eliminating — single-use plastics protects the so-called ‘rights of nature.’ It is not the purpose here to investigate in detail this issue, which has its origins in the 70s when Christopher Stone wrote an article entitled ‘Should trees have standing?’ The rights of nature have developed thanks to the jurisprudence of mainly Latin American courts and to amendments to the Constitution (Ecuador being illustrative example). The Inter-American Court of Human Rights, in its Advisory opinion of 15 November 2017, recognised the existence of a right to a healthy environment as an autonomous

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38 Ivi, p.221.
39 Ibid.
right, which presents an individual and a collective dimension. In its collective dimension, it constitutes an ‘universal interest’, which must be granted to both present and future generations. In its individual dimension, its violation might directly or indirectly impact on other rights, such as the rights to health, to personal integrity, to life, among others. The Court acknowledged that the degradation of the environment can cause irreparable damages to all human beings, with the consequence that the right to a healthy environment is fundamental for the existence of humankind. I will not discuss here whether non-human animals or rivers, seas and oceans should have legal personality, whose rights can be represented in court. What I would stress here is that the reduction of plastics does not only benefit humans, but also the environment itself. Far from being contradictory in the case of plastics, the rights of nature and the human right to a decent environment converge, and they should be balanced, in the case of plastics as well as in other situations, in order to overcome a pure sterile anthropocentric approach which constitutes the backbone of the current strategy and directive on plastics. As anticipated by Boyle, a right to a satisfactory decent environment ‘would be less anthropocentric that the present law. It would benefit society as a whole.’ It would do so because the status of environmental degradation has increased so fast in recent years that the protection of the rights of the nature is fundamental for the respect of human rights, first and foremost the right to life. It is clear that there might be cases in which the interests of the nature conflict with human interest — consider the cases of biodiversity in EU law — but, paraphrasing a decision of a court in Ecuador, the two interests do not collide here since the realisation of one interest can be achieved while respecting the other interest. Even though international environmental law basically, at least for the time being, remains anthropocentric, there are non-anthropocentric developments that reveal a growing recognition of the environment as a public interest. Anthropocentrism and non-anthropocentrism can be reconciled in environmental ethics, which examines human beings’ relationship with the natural environment. The reduction of single-use plastic products has value both inherently and as benefits for present and future generations of human beings. As Stone argued even before environmental law had started to develop at the international level, ‘because the health and well-being of [human]kind depend upon the health of the environment, these goals will often be so mutually supportive that one can avoid deciding whether our rationale is to advance ‘us’ or a new ‘us’ that includes the environment.’

This was precisely the point caught by the Inter-American Court of Human Rights, which emphasised in its Advisory opinion how, compared to other human rights, the right to a healthy environment protects nature, even absent evidence of possible risks for human beings, because of its importance for the rest of living beings, deserving protection.\(^{47}\) It is precisely the ‘us’ including the environment envisaged by Stone; an environment which must be conceived as including both flora and fauna. It follows that human beings bear the responsibility to protect this value and, through their actions, to develop an environmental consciousness.\(^{48}\) Raising awareness is one of the objectives of the Directive, indeed, and the red thread of the environment as a public interest could have connected all the measures aimed at the reduction or the elimination of single-use plastic products.

3. The Weakness (II): The Lack of Reference to the Precautionary Principle

The precautionary principle is absent from the text of the Directive. First recognised in soft law acts, this principle has gained momentum with its incorporation in EU law. The principle is mentioned in Article 191(2) TFEU in relation to the protection of the environment: ‘Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.’ Despite this unique provision, the scope of the precautionary principle is much wider, as stressed by the European Commission in a Communication on this issue of 2000, ‘specifically where preliminary objective scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen by the Community.’\(^{49}\) As confirmed in the preamble, single-use plastic products might ‘pose a severe risk to marine ecosystems, biodiversity and, potentially, to human health.’\(^{50}\) There is not much evidence of the impact of both plastic waste in the long term and of microplastics on the human body. Due to the pervasiveness of microplastics in the environment, especially the marine environment, every human being might be exposed to microplastics, even eating food, even (probably) breathing. The precautionary principle is absent from the text of the Directive.

Despite being silent on the precautionary principle, the Directive refers, but in a very vague way, to the principle of sustainable development. In the preamble, it is highlighted that the legal instrument contributes to the achievement of Sustainable Development Goal No.12 of the Agenda 2030 of the United Nations, aimed at ensuring sustainable consumption and production patterns. Nonetheless, apart from a reference in the preamble, the principle does not permeate the measures envisaged in the Directive.

\(^{46}\) Stone, ‘Should Trees Have Standing?’, p.489.

\(^{47}\) OC-23-17, para. 180.

\(^{48}\) S. Iovino, _Le filosoﬁe dell’ambiente_ (Bari: Carocci, 2008), p.83.

\(^{49}\) COM (2000) 1 Final, 2 February 2000, p.3.

\(^{50}\) Directive 904/2019, preamble, recital No.5.
V. Conclusions

This article was meant as first comment on the Single-Use Plastics Directive adopted by the European Parliament and the Council in June 2019. From the analysis of the main provisions and the measures Member States are obliged to adopt at the domestic level (with broad margin of action), the innovative impact of the Directive clearly emerges. For the first time at the international level, this Directive responds to the concern of plastic waste in the oceans and the seas. Nonetheless, in dealing with this topic, the European Union has proved to be driven by mere — though important — economic considerations, which can be located in the general debate on circular economy. The missing point I stressed in the previous pages is the absence of a human rights-based approach in the Strategy and the Directive, which could have taken into consideration the evolution of a right to a healthy environment. This human right could have overcome the anthropocentric view which has characterised EU environmental measures. The protection of the environment is the conditio sine qua non for the safeguard of human and non-human life. As outlined by the Special Rapporteur on Human Rights and the Environment, John H. Knox, in its Framework Principles, 'States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.'

Environmental law and human rights law are strictly and inevitably correlated. Even though the right to a healthy environment cannot be said to have clearly consolidated at the international level, the European Union should not miss the opportunity to evolve its policies in the field of the environment in a less anthropocentric and more inclusive way. Furthermore, the absence of the precautionary principle from the text of the Directive constitutes a missed opportunity to reflect on the possible impact of plastic waste on human and non-human beings. A scholar has provided an overview, based on empirical observation, of the four major stages of development of the EU environmental governance: the 'environment regime' which dates back to 1972; the 'internal market regime' (1982); the 'integration regime' (1992); and the 'sustainable development regime' (1998). It is time for the European Union to evolve towards a 'right to a decent environment regime' which encompasses individual and collective (where collective means 'us' humans, non-human beings and the environment) considerations alike.